Responsiveness Summary
and
Concise Explanatory Statement

Chapter 173-503 WAC
Instream Resources Protection Program:
Lower and Upper Skagit Water Resources Inventory Area (WRIA 3 and 4)

Administrative Order #99-05

March 2001
Publication No. 01-11-004

Responsiveness Summary
and
Concise Explanatory Statement Project

Chapter 173-503 WAC
Instream Resources Protection Program:
Lower and Upper Skagit Water Resources Inventory Area
(WRIA 3 and 4)

Administrative Order #99-05

Prepared by Rod Sakrison
Water Resources Program
Washington State Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

March 2001
Publication No. 01-11-004

For additional copies of this document, contact:
Department of Ecology
Publications Distribution Center
P.O. Box 47600
Olympia, WA 98504-7600
Telephone: (360) 407-7472

Table of Contents

I. Introduction and Background Statement 1
- Summary of the Purpose of the Rules
- Statutory Authority
- Scheduled Adoption Date and Effective Date of the Rule

II. Differences Between Proposed and Adopted Rule 1
III. Summary of Top Issues 2
IV. Comment and Responses (Responsiveness Summary) 4
V. Summary of Public Involvement Actions 28
- Workshop Dates and Locations
- Hearing Dates and Locations
- Mass Mailings
- Advertisements/Newspaper Announcements

Appendices

A. Copies of all written comments and corresponding comment numbers (not available online)
B. List of individuals providing oral comments and corresponding comment numbers
C. Copies of all public notices (not available online)
D. Copy of Hearing Transcript (not available online)
E. Copy of final rule – Chapter 173-503 WAC

Attachments

A. Implementation Plan
B. Rule-Making Criteria Documentation

Note: For copies of documents not available online, contact Rod Sakrison, Department of Ecology, (425) 649-4447, [rsak461@ecy.wa.gov].

I. Introduction and Background Statement

The rule is intended to retain perennial rivers, streams, and lakes with instream flows necessary for the preservation of wildlife, fish, scenic, aesthetic, and other environmental values, and navigational values, as well as recreation and water quality, and to determine that a certain amount of water is available for further appropriation. The rule is based on recommendations that were submitted to Ecology pursuant to a Memorandum of Agreement signed in 1996 by local governments in Skagit County, tribes and the departments of Fish and Wildlife and Ecology.

The rule establishes instream flows for the Lower and Upper Skagit River and Cultus Mt. Tributaries. All pending and subsequent water right applications would be subject to the rule. Existing water rights would not be affected. To assure that the historic hydrologic regime and ecological functions are not significantly altered, the rule limits the total amount of water that can be withdrawn from the Skagit River. This affects the amount of water that is available for further appropriation from surface and ground waters. Although existing water rights would not be affected, they would be estimated and counted as an existing base amount of already-appropriated water rights.

Once the rule is effective, Ecology would be ready to begin processing of water right applications in the Skagit Basin. The administration of the rule is addressed in the attached Implementation Plan.

- ## Summary of the Purpose of the Rules

The proposed rule will establish instream flows for the Lower Skagit Mainstem and Cultus Mountain tributaries. The proposed rule will also establish a quantity of water that may be available for appropriation from the surface and ground waters regulated by this proposed rule. All pending and subsequent water right applications will be conditioned as provided in the proposed rule, and subject to the determination of water availability, if applicable.

- ## Statutory Authority

Instream flows are authorized under Chapter 90.54 RCW (Water Resources Act of 1971), Chapter 90.22 RCW (Minimum water flows and levels), and Chapter 173-500 WAC (Water resources management program).

- ## Scheduled Adoption Date and Effective Date of the Rule

Rule adoption is scheduled to occur on March 12, 2001. The effective date of the rule will be April 12, 2001.

II. Differences Between Proposed and Adopted Rule

There are two changes from the proposed rule:

WAC 173-503-040 (1). The term “with telemetering” has been struck from the Control Stations for Mundt, Turner, Gilligan and Salmon creeks. Field biologists working for the Skagit PUD commented that because of the remote, mountainous terrain it was not possible to receive signals from a telemetering device. Instead, personnel from the Skagit PUD will visit the sites on a daily basis and record gage readings.

WAC 173-503-070 (1). Additional language was added to clarify that the rule does not affect existing rights of hydroelectric and water storage projects. This change was brought about as a result of comments from Puget Sound Energy, Inc., that the rule would be applied to their Baker River Hydroelectric Project (FERC No. 2150). The added language makes clear that the Baker

Project would not be required to provide flows to maintain the relatively high instream flow levels measured at the Mount Vernon gage. (See responses # 6-7 to PSE comments).

One simple editing change was required: WAC 173-503-040 (2). Column 2. Calendar dates had to be corrected to show the first period of December to be "1-15", not "1-5" as in the proposed rule.

III. Summary of Top Issues

The nineteen comments on the proposed rule were received by Ecology during the official comment period. The comments were split; about half in favor of the rule, and another half recommending changes to the rule or withdrawal of the rule.

Comments in favor of the rule.

The proposed rule brought forth comments of support from the environmental community and tribes. Their comments praised the efforts of Ecology to take a more holistic approach to maintaining a healthy ecosystem by protecting the riverine and estuarine environments.

Comments not in favor of the rule.

Scientific process for developing instream flows in rule questioned.

The most prevalent of the comments critical of the proposed rule questioned the scientific process that the Skagit River Instream Flow Committee followed to develop the recommendation that Ecology accepted for the purposes of rule-making. Several commented that there was a lack of adequate documentation of the decision process that the Committee followed. The DNS, Checklist and Supplemental Environmental Analysis (Ecology, October 2000) summarized the data, decisions and recommendations of the Committee. A more complete description of the decision process was available in a Technical Appendix.

Role of professional judgement in protecting fish and habitat characteristics.

Several other comments in regard to fisheries protection make the point that the rule is directed at protecting habitat characteristics without taking into account the actual presence of fish and whether the rule will result in an increase in fish production. These comments also question the role of professional judgement and whether adequate site-specific data was collected to support the fisheries recommendations.

Effect on senior rights.

Another prevalent concern was whether the rule would affect senior rights. Puget Sound Energy (PSE) commented that the instream flow rule would have a detrimental effect on their Baker Hydropower Project by requiring the release of stored waters to maintain flow levels at the Mount Vernon gage. This is not the case and instream flow rule does not require anyone to put water into the river to maintain the flows. This has been communicated many times in public workshops, hearings and the environmental documentation accompanying rule-making. The rule is a regulatory measure that requires new water rights, junior in priority to the rule, to cease diversions when flows drop to the levels in the regulation. Ecology has attempted to meet PSE's concerns by adding new language that specifically states that the rule does not affect the existing rights of hydropower and water storage reservoirs or related facilities.

Ecology met with Puget Sound Energy on February 9, 2001 to review the responses to their extensive comments that were received during the official comment period (see official responses below to the comments of Puget Sound Energy and Philip Hilgert, on behalf of PSE). Ecology and PSE discussed PSE's concerns that the instream flow will be used by other parties or Ecology in conjunction with other regulatory authorities to require flow releases to meet the instream flows at the Mount Vernon gage.

Ecology has added to WAC 173-503-070 (1) "nor shall it affect existing rights relating to the operation of any hydroelectric or water storage reservoir or related facilities." Ecology agrees that this clarification is warranted. State statute (Ch. 90.22. 030) expressly exempts existing rights for hydropower and water storage reservoirs and related facilities from instream flows.[1] This should clarify for other parties that the instream flow rule is not intended to affect the Puget Sound Energy's existing rights.

Puget Sound Energy is also concerned that Ecology could use separate authority granted under Section 401 of the federal Clean Water Act to require the instream flows at Mount Vernon in the rule to be met under terms and conditions of a water quality certification (yet to be issued). The "Elkhorn" decision clearly gives Ecology the authority to put instream flow conditions on a water quality certification. Ecology made a statement in the SEPA Checklist (Ecology, October 2000, p. 16) that "*future licensing or relicensing of hydropower projects would be affected by the proposed instream flow rule indirectly through water quality certifications issued by Ecology pursuant to the federal Clean Water Act."* This statement should have stated that for the purposes of the Section 401 water quality certification, Ecology will use scientific information for instream flow needs in the middle portion of the Skagit River pertinent to the Baker Project relicensing and not the Mount Vernon flows per se.

During relicensing, PSE will be asked to conduct relevant studies in the immediately impacted area of the Baker and Skagit rivers. Those studies will form the basis of recommendations regarding instream flows, ramping rates and reservoir storage criteria appropriate to the operation of the Baker Project that may be included in the Section 401 water quality certification.

Puget Sound Energy suggested that more definitive language should be added to WAC 173-503-070 in the form of two new subsections. One addition would establish that hydroelectric power generation is a beneficial use protected under the Clean Water Act. Ecology has rejected this comment (see Response # 50 to PSE's comments). Setting instream flows in the Lower Skagit mainstem will protect beneficial uses from degradation and maintain water quality during critical times of the year.

The other suggested addition would state that the rule would not be used directly or indirectly through water quality certifications to determine or affect the terms or conditions of any existing or new license under the Federal Power Act, or to determine whether operation of any such existing project conforms with the requirements of Chapter 90.48 RCW (the State Water Pollution Control Act). Ecology also rejects this comment. This is not a comment on the proposed rule, but addresses a separate issue. The authorities under which Ecology is proposing this rule (chapters 90.22 and 90.42 RCW) do not allow for the abrogation of rights or duties delegated to Ecology pursuant to the federal Clean Water Act (chapter 90.48 RCW). PSE's concerns regarding the relicensing of the Baker River Project have been addressed, and Ecology reiterates that new flows appropriate to the Baker Project will be developed later for the water quality certification.

Instream flows too stringent.

Several comments were received that the rule was too stringent, that the proposed flow levels were unnecessarily high for fish protection. This will cause new water rights to be interrupted on a frequent basis in the low flow period of the year. The environmental documents and presentations at the public workshop and hearing clearly stated these points.

Effect on ground water withdrawals.

---

[1] RCW 90.22.030 Existing water and storage rights –Right to divert or store water. "The establishment of levels and flows pursuant to RCW 90.22.010 shall in no way affect existing water and storage rights and the use thereof, including but not limited to rights relating to the operation of any hydroelectric or water storage reservoir or related facility."

Another area of controversy was the effect of the rule on ground water withdrawals in the Skagit watershed. The rule treats ground water much the same as surface water: withdrawals must cease when flows drop below the instream flow level. Furthermore, the presumption is that all ground water is in continuity with surface water unless it can be shown that there is not impairment of the instream flows. This sets up a costly and difficult test for new water right applicants to meet if they expect to receive new groundwater rights. Also brought out in the comments and at the public hearings were Ecology's and the state Department of Health's policies of not allowing public water systems to rely on water rights that would be interrupted on a frequent basis. Several comments suggest this might cause even more new development to be supported by exempt wells.

Determination of water availability too conservative.

Several comments raised issues with the determination of water availability. Some had the view that the amount of water determined to be available was unnecessarily conservative and could have impacts on local economic development. The uncertainty associated with estimating existing rights, particularly claimed rights, did not materialize as an issue of concern in the public record.

IV. Comment and Responses (Responsiveness Summary)

Comments of Judy Turpin, Representing Washington Environmental Council, at the DOE Public Hearing, 11-29-00.

1. *[W]e recognize that this rule proposal is an essential element in that Agreement (the 1996 Memorandum of Agreement).*

   Response: Ecology's role in the MOA was to participate on the Lower Skagit Instream Flow Committee, and to move an instream flow recommendation to rule-making. The recommendation came with the concurrence of state agency fish biologists who represented the departments of Ecology and Fish and Wildlife on the Committee. After the flow recommendation was forwarded to Ecology (May 8, 1999), a proposed rule was to be filed within 18 months, for final adoption within two years. If these conditions were not met, the Agreement would be no longer be binding on the parties.

2. *[R]ecent scholarship has stressed the importance of taking a more holistic ecosystem approach that recognizes the importance of natural streamflow variability in maintaining a healthy ecosystem. This proposal is a significant improvement over the regulations adopted in the '80s and the other WRIAs in that regard.*

   Response: Ecology has endeavored to improve the effectiveness of instream flow rules. The proposed rule protects the low and high flow periods, and has special protections for the Skagit estuary.

3. *We understand that hydro operations may be having a significant adverse impact. This is a separate matter, but it does need to be investigated and addressed, because at a time when sport and tribal fishermen are curtailing harvests on listed stocks and Skagit River farmers are being asked to provide protection under the county's Critical Area Ordinance, it wouldn't be fair for – to allow a few days of hydro operations to negate those efforts.*

   Response: Operations at the two hydroelectric power generating projects in the Skagit Watershed are under the federal jurisdiction of the Federal Energy Regulatory Commission (FERC), pursuant to the Federal Power Act. The proposed rule is not intended to affect their current operations. The Department of Ecology has authorities delegated to it under the federal Clean Water Act, and will seek protection of salmonid resources in the middle reach of the Skagit River mainstem through those authorities.

Written Comments of Pamela W. Krueger, Perkins Coie LLP, on behalf of Puget Sound Energy, Inc. ("PSE").

GENERAL COMMENTS:

1. *The information provided by WDOE describes the proposed rule, but in many instances, critical instream flow decisions are cited as professional judgement unsupported by site-specific data, citation or other supporting documentation.*

   Response: Professional judgement is a necessary aspect of rule-making. Instream flows require professional judgement at many steps throughout their development. Site-specific data is certainly preferred in most cases; however, it is not always practical or necessary as long as scientifically based conclusions can be applied to the geographic setting. The documentation presented in the Determination of Nonsignificance (DNS), Environmental Checklist, and Supplemental Environmental Assessment (SEA) is based on field measurements and analysis. The supporting data are contained in an Appendix that documents the various steps that were taken to make the instream flow recommendation. The analysis also relies on the combined knowledge of senior fisheries biologists on the Instream Flow Committee. Biologists from the state agencies of Ecology and Fish and Wildlife, as well as Tribal biologists, reviewed and commented on all studies preceding the recommendation. Ultimately, their professional judgement strongly influenced whether the instream flow recommendation should be accepted for rule-making.

2. *Minimum instream flows are typically set at values with the expectation that such flows are typically available in an unregulated flow regime.*

   Response: The goal of instream flow-setting is primarily to protect and preserve fish, fish habitat, wildlife, recreation, water quality and other environmental values. Protection of fish and their habitat is also necessitated by the recent listings of endangered and threatened species, especially salmonids. A main purpose of the Skagit Instream Flow rule-making process is to protect the habitats that are critical to listed species. This translates to identifying flows necessary to create habitats that protect properly functioning ecological processes.

3. *The minimum flows in the proposed rules, thus, create a false expectation that bears little or no relationship to reality.*

   Response: If the instream flow levels are not adopted at high enough levels to fully protect critical habitats, the recurrence of desired flow conditions will be reduced. The instream flow rule does not require anyone to put water in the river to reach those instream flow levels. The instream flows listed in the rule merely state the levels at which flows are surplus to instream needs such as fish habitat and possibly available for new out-of-stream diversions.

4. *The rules provide slim opportunity for reasonable attainment, and create a situation in which new water right permit holders would be unable to exercise their rights, or have their use substantially reduced, during the Fall season.*

   Response: The environmental documents are quite clear that new water rights will be subject to the relatively high and less frequent instream flow levels during critical times of the year. These consequences have been discussed in public workshops and hearings, and the public record is incorporated into this Responsiveness Summary.

5. *Rather than protecting natural resource values, the proposed flow regime is likely to create water management problems due to artificially high flows and a limited water budget.*

   Response: The water management issues accompanying the instream flow rule were discussed in the Supplemental Environmental Analysis. Water management problems are tractable and will be considered in watershed planning, whereas recovering instream resources after damage has occurred is uncertain and costly.

6. *Additionally, the success of instream flow protections appear to rest in part on an expectation that hydropower producers like PSE (and, due to the status of the Seattle City Light license, likely only PSE) will augment flows during low flow periods.*

Response: Senior water rights will be unaffected by the instream flow regulations. There is no expectation in the rule that hydropower producers will augment flows. This possibility was mentioned in the 1996 MOA between the local entities, tribes and state agencies. Specifically, the MOA does not bar local water utilities from approaching the hydropower producers to purchase stored waters during times of curtailment (when flows are lowest). This would only occur at the initiation of local government and the hydropower producers. This element of the MOA has not been brought forward into the proposed rule.

7. *WDOE specifically relies on its purported ability to exercise its water quality certification authority with respect to the license for the Baker River Hydroelectric Project, No. 2150, upstream of the critical reach at RM 24.3 selected by WDOE.*

Response: There is no mandate in the proposed instream flow rule that would compel Puget Sound Energy to meet the instream flows proposed to be established at the Mount Vernon gage, nor was any request made at any time during the rule-making process to consider such a suggestion.

8. *However, contrary to statutory mandate, WDOE has neglected to consider water availability in the context of the reservoir and storage rights associated with this same license, and WDOE has also apparently failed to consider the effect of seasonal consumptive rights.*

Response: See response to Comment No. 7.

9. *As part of the November 29, 2000 submittal, WDOE was asked to respond to a list of eight questions and additional information requests designed to clarify the factual data supporting instream flow decisions used as a basis for the proposed rules (see attached).*

Response: The eight questions were submitted by Phil Hilgert, R2 Resource Consultants, Inc., on behalf of PSE. They are answered in the section following PSE's comments.

10. *WDOE's refusal to provide factual information related to its proposed rule that would allow for meaningful comment short circuits the public process and violates procedural due process norms.*

Response: Ecology has provided to both PSE and SCL the complete technical reports and appendices that were used to support the instream flow recommendation now proposed for adoption. Ecology has no other field data available. PSE requests for data are based on speculations about what Mr. Hilgert considers alternative methods to perform instream flow studies that could have been pursued by the Instream Flow Committee. Simply put, Mr. Hilgert suggests that the field work should have included a greater attempt to exhaustively look for fish occupying the critical chinook-preferred habitat. Extensive field work did occur (such as snorkeling the critical reaches) even though it was difficult to perform, and it provided valuable site-specific detailed knowledge of fish habitat use for the biologists. Other data requests also address alleged deficiencies in the instream flow methodology. These requests are for data that doesn't exist or was not developed to do an alternative analysis. These requests for additional data are intended to invalidate the instream flow study. The main contention is that the state agencies can not say specifically how many fish occupy the study areas every day of the year. We recognize that if there was no limit to the time and budget available to gather statistically-significant observations of a variety of fish species and life stages using the river's habitat, day-by-day for many years, we would be better able to confirm predicted/observed relationships between the different fish species and the recommended instream flows. Despite these data gaps, we believe enough is known about chinook and other salmonids in the Skagit system to identify critical habitat and complete the IFIM analysis that formed the basis for the instream flow recommendation.

11. *Establishing a sound basis for the technical decisions used to support the proposed rule should be a critical step in deciding whether to adopt the rule, especially since the rule is expected to be integrated into the results of studies conducted on upstream reaches.*

Response: Integrating the resource requirements and operational considerations in the various sections of the Skagit River watershed is a long-term goal of state water resources management. The sequencing of studies and planning in the different reaches is evolving slowly over time. Beginning in the middle 1980's, the mainstem Skagit above Rockport was studied by Seattle City Light as part of the relicensing of the Skagit River Project. In 1996, the local governments in the lower Skagit area began the Lower Skagit Mainstem Instream Flow study that will culminate in the adoption of the proposed instream flow rule. Puget Sound Energy began relicensing procedures for the Baker River Project in 2000. The resource agencies are requesting that PSE study the middle reach of the Skagit River mainstem, below Concrete.

What is important in one stretch of the river may not be important in another. A case in point is the high-use chinook spawning that occurs above Rockport, below Seattle City Light's Skagit River Project. In studying that portion of the river, the resource agencies came to the conclusion that flows (and depth and velocity relationships over the spawning areas) were not as important as ramping rates, making sure that spawning doesn't occur at too high flows, and providing a consistent flow regime. Because of the configuration of the lower Skagit River in the study reaches (mostly hydrologically-modified), the spawning and rearing flows derived from the IFIM results were not concerned with ramping effects and potential stranding of redds. Stranding doesn't generally occur in the lower Skagit mainstem since the banks are steep and, in many areas, hardened. Flows necessary to protect the rearing habitat in the estuary were based on a study that focused on maintaining a frequency of preferred chinook rearing conditions. The lower mainstem and estuary flows are harmonized in the proposed instream flow rule. Ecology believes that the recommended instream flows are best adapted for the lower Skagit mainstem.

12. *Although the technical studies addressed only a small, and, for flow setting purposes, unrepresentative, portion of the Lower Skagit, WDOE proposes that the rule be used to affect the entire Lower and Upper Skagit Watershed (Supplemental Environmental Analysis, pg. 21).*

Response: Any extraction of water from the upper watershed will affect flows downstream at the Mount Vernon gage. Therefore, all new applications would be subject to the rule, including a decision as to whether there is still water available. All new permits will be conditioned with the instream flows. Ecology has considered whether this will be a workable long-run water management scheme for the entire WRIA 3 and 4 (e.g., should an applicant for water rights in Darrington be regulated by flows at the Mount Vernon gage?). Under section 040 (1) of the proposed rule, Ecology has the authority to establish additional control stations upstream to improve water management.

13. *Rather than adopt the rule as proposed, instream flow setting for the Lower and Upper Skagit River should be accomplished as part of ESHB 2514 watershed planning, after the completion of critical studies that will provide the evidence needed to support setting flow levels.*

Response: This issue was discussed in the SEA (see pp. 22-24, "Implementation of the Watershed Management Act").

14. *If WDOE's proposed rule will affect the entire mainstem Skagit River, then it is appropriate to consider instream flow requirements based on data collected in the affected reaches – rather than ignoring two sources of data in the interest of rushing to a result – providing an (illegitimate) basis for authorizing new water rights.*

Response: See Response #12 above.

15. *Instream flows designed to protect spawning salmonids during the periods April, May, June, October, November and early December did not consider upstream reaches which support the majority of salmon and steelhead spawning. In addition, the proposed rule emphasizes protection of steelhead spawning below Sedro Woolley during the spring months to the likely detriment of juvenile chinook salmon rearing in side channels and margins of the mainstem Skagit River above Sedro Woolley.*

Response: A fifty-year flow record was used to evaluate protection of the spawning salmonids in the Lower Skagit mainstem during the months mentioned. These flows represent the average conditions that have occurred

in the contributing watershed, including flow regimes upstream from the study area. Embedded in the flow data are periods of peak high and low flows; periods of flow release for power generation and seasonal storage, and periods when fisheries flows were given priority. Until new flow agreements are proposed, the Lower Skagit mainstem will likely see the same range of flows that are representative of the historical flow record. ..

16. *Data were not presented to document that the availability of steelhead spawning habitat is limiting production in the Skagit Basin and that protection of steelhead spawning habitat should override protection of rearing habitat for both steelhead and chinook salmon.*

The Committee did not override protection of juvenile salmonids by focusing on steelhead spawning habitat. The biologists prioritized the fish species and lifestages to arrive at a minimum instream flow that would protect and preserve the whole fish community, since many species and lifestages coexist simultaneously. The Committee compared the natural range of flows encountered during the spawning and incubation seasons to the proposed spawning and rearing flows. In certain months, the spawning lifestage was given a higher priority, e.g., when it was the most active lifestage and it could be accommodated without hurting the juvenile salmonids. The habitat values from the IFIM study were not the only information considered. Many factors affect fish production besides the quantity of fish habitat. The biologists used their professional knowledge of fish production and fish habitat to determine that both spawning and rearing could be protected in certain months by using a flow weighted toward the peak value from the IFIM study for spawning. Maintaining these spawning flows would not reduce the amount of rearing habitat below the normal range of rearing habitat available during these seasons.

17. *Relying on future amendments[2] to the proposed rule may not adequately protect upstream resources, and decisions on pending water right applications would be jeopardized by such amendments.*

Response: Ecology has anticipated that the rule will be reopened after the completion of watershed planning under ESHB 2514. Pursuant to section 100, the regulation may be reviewed under a variety of circumstances. Similarly, adoption of other instream flow rules has involved working around FERC licensing proceedings. For example, Chapter 173-507 WAC (Snohomish Instream Resources Protection Program, 1979) left flows for the Sultan River out of the regulation, pending completion of the FERC licensing process, which took another dozen years to complete.

COMMENTS: SPAWNING FLOWS ARE BASED ON AREAS SUPPORTING LIMITED SPAWNING:

18. *WDOE's proposed rule to protect spawning salmonids is based on measurement of two transects at a shallow section at RM 22. Instream flow rules that affect spawning conditions throughout the river should be representative of reaches that support the majority of spawning activity, rather than assuming a short reach that supports limited spawning is critical to spawning success in the basin.*

Response: The study was directed at the lower reach and these selected areas were considered by biologists to be the best spawning habitat in the Lower Skagit mainstem. The transects were representative of the spawning area. The upper portion of the mainstem Skagit has already been studied by Seattle City Light and has adequate protections in place. The principal focus of the proposed instream flow is water management in the lower Skagit watershed. Most of the major water users and proposed large water uses are in the lower Skagit Valley. Therefore it was reasonable to do the instream flow studies in the portion of the river that would be most immediately impacted by new diversions or withdrawals.

19. *Upstream areas, which support the majority of salmonid spawning, were not considered in the flow recommendation. Data which might indicate why the selected reach is critical to spawning salmon and*

[2] In this regard, PSE recommends, if the proposed rule is adopted, that WAC 173-503-100 be revised to require that a review of the rule be initiated as soon as watershed planning for WRIA's 3 and 4 has been completed.

steelhead were not included in the available information and were not provided by WDOE in response to R2's request for information submitted on November 29, 2000.

Response: See response to Comment #18 above.

20. *WDOE's approach certainly does not predict optimal habitat conditions will exist, even if the proposed flows were reasonably attainable.*

Response: The instream flow recommendation represents a balancing of species and life stages that is neither "optimal" or "maximum." It is the best single set of flows for protecting the highest value resources at critical times of the year.

21. *Since the proposed rule affects the entire Lower and Upper Skagit watershed (SEA pg. 21), flow recommendations to protect spawning salmonids should at least consider areas heavily used by spawning salmonids. To fail to do so, and then fail to provide information justifying this departure, provides stark evidence that WDOE simply failed to consider the interdependence of various portions of the existing biological system.*

Response: See Response to Comment #18 above.

COMMENTS ON USE OF OBSERVED/EXPECTED RATIOS TO DEVELOP PREFERENCE CURVES

22. *Attempts to use a ratio of habitat utilization to habitat availability (Observed/Expected) to develop Category III preference curves are controversial and considered inappropriate by many within the instream flow scientific community.*

The biologists involved in the Instream Flow Incremental Methodology (IFIM) study had extensive experience in the method. Two of the biologists involved each had 18 or more years of experience using IFIM to determine instream flows in Washington. They were fully aware of all the advantages and disadvantages of different methods of making preferences to use in the IFIM study. These experienced biologists were agreed that the preference curves were appropriate and valid. The following citations reflect the professional knowledge of Dr. Hal Beecher, biologist from Washington Dept. of Fisheries and Wildlife:

> Beecher (1995) compared the ability of preference curves (based on observed/expectedratios) and utilization curves to predict fish distribution, and found that preference curves were clearly superior for replicating the distributions of simulated fish. When preferences are for common values of velocity, there is less difference between the two. Field testing of preference curves indicated that they are useful in identifying microhabitat where fish are found (Beecher et al., 1993, 1995).
>
> Beecher, H.A. 1995. Comparison of preference curves and habitat utilization curves based on simulated habitat use. Rivers 5 (2): 109-120.
>
> Beecher, H.A., J.P. Carleton, and T.H. Johnson. 1995. Utility of depth and velocity preferences for predicting steelhead parr distribution at different flows. Transactions of the American Fisheries Society 124: 935-938.
>
> Beecher, H.A., T.H. Johnson, and J.P. Carleton. 1993. Predicting microdistributions of steelhead parr from depth and velocity criteria: Test of an assumption of the Instream Flow Incremental Methodology. Canadian Journal of Fisheries and Aquatic Sciences 50 (11): 2380-2387.

23. *Given the controversial nature of Category III preference curves, the supporting data and at least a comparison of the two methods should have been included in the Supplementary Environmental Analysis to allow an objective evaluation of the merits of the Category III process.*

The technical experts on the Committee did not feel that kind of detailed comparison was needed for them to select preference curves for use in the IFIM study. Also, see response to Comment #22, above.

COMMENTS: SKAGIT STEELHEAD PRODUCTION ASSUMED LIMITED BY AVAILABILITY OF SPAWNING HABITAT

24. *According to WDFW, the availability of spawning habitat rarely limits steelhead production; yet, during the months of April, May and June, WDOE's proposed rule emphasizes protection of spawning habitat instead of flows to protect steelhead rearing. In addition, juvenile chinook are rearing in mainstem and side channel habitats during this period.*

    Response: These trade-offs between species and life stages are rarely simple issues. The Instream Flow Committee debated the relative merits of placing one species' needs ahead of another. These decisions are documented in the *Final Technical Report – Lower Skagit River Instream Flow Studies* prepared by Duke Engineering & Services, Inc., for the Skagit PUD and the City of Anacortes (DE&S, Bellingham, Washington , June 1999). Also, see the response to Comment #16, above.

25. *At the recommended minimum flow of 12,000 cfs, WDOE's instream flow study suggests there is 21,918 ft2 of Weighted Usable Area (a measure of potential habitat) for juvenile chinook per 1,000 feet of channel. At a flow of 10,000 cfs, WDOE's instream flow study indicates there is 24,380 ft2 of Weighted Usable Area for chinook juveniles. Thus, during a period when chinook juveniles are actually rearing in the system, WDOE's recommended flows decrease available habitat for a federally listed species to optimize steelhead spawning habitat.*

    Response: See the response to Comment #16. This situation is not atypical nor would it necessarily constitute a violation of the Endangered Species Act.

26. *In the absence of information on flows required to protect chinook and steelhead rearing in the upstream majority of the mainstem Skagit River, the proposed rule will unduly constrain future instream flow decisions designed to protect resources in the mainstem Skagit River above Sedro Woolley.*

    Response: The proposed instream rule does not attempt to reconcile potential unknown conflicts. It could be a foundation for folding-in flow agreements and future instream flow studies as they are completed. Flow coordination would be an important topic in future instream flow studies.

COMMENTS: REARING ANALYSIS DISREGARDED MAJORITY OF LOWER SKAGIT RIVER HABITAT

27. *Standard protocol for IFIM analyses were modified for the Lower Skagit Study to consider only the slowly flowing waters near the shorelines when determining flow recommendations to protect juvenile salmonids (DES 1999).*

    Response: Standard protocol for IFIM analyses is to confer with experienced and knowledgeable agency and tribal biologists so the IFIM results match what habitat the different fish species and lifestages actually use. That was the protocol used in the Skagit River IFIM study. The protocol used was the same as used for other rivers in Washington over the last several years.

    The practice of emphasizing the near-cover lateral eddy region of the river in modeling the relationship between habitat and flow reflects observed behavior of juvenile salmon and steelhead. These protocols have been discussed with Dr. Clair Stalnaker, recently retired head of the Instream Flow Group (U.S. Geological Survey), which developed the Instream Flow Incremental Methodology (IFIM) and the Physical Habitat Simulation (PHABSIM) system. Dr. Stalnaker is adamant that this approach is a proper use of PHABSIM because it reflects actual fish behavior and habitat selection.

28. *If future studies are to be integrated into the lower River analyses, such departures from standard protocol should be well supported by site-specific data and citation rather than opinion.*

Response: The Skagit River IFIM study was done using standard protocol of the Washington state natural resources agencies.

COMMENTS ON THRESHOLD IMPACTS AT 10% WITHDRAWALS

29. *According to the SEA, "The Committee determined that significant impacts to the hydrological regime would occur at a 10 % maximum threshold on water withdrawals from the river" (SEA pg. 13). How were the threshold criteria established? What are the biological effects of the significant impacts?*

Response: The 10% threshold was developed by the consensus of the Instream Flow Committee based on the professional judgement of senior fish biologists. These biologists believed that the shape of the hydrograph was needed to be maintained to sustain a healthy and properly functioning ecosystem.

30. *Because WDOE has failed to take into account the combined daily storage of water, which itself may exceed the 10 % maximum threshold envisioned by the proposed rule, even the reasonable attainment of withdrawal maximums is unlikely to be met because of existing rights.*

Response: Ecology is only counting consumptive water rights in the total water withdrawals. The seasonal effects of storage at hydroelectric projects has not been factored into the total allowable withdrawals. Senior water rights will be unaffected by the instream flow regulations. There is no expectation in the rule that hydropower producers will augment flows

COMMENTS: PROPOSED INSTREAM FLOWS ARE NOT CAPABLE OF BEING MET FOR MORE THAN 70% OF THE TIME BETWEEN SEPTEMBER 1 AND OCTOBER 15

31. *The table below reflects the average percentage of the time that the proposed instream flows would not be met (based on the historical data). This demonstrates how infrequent the proposed instream flows would be met based on historical experience.*

Response: This information is available in the *Final Technical Report – Lower Skagit Instream Flow Study* (DE&S, 1999). The expected frequency that the instream flows would be expected to recur was mentioned frequently in the Checklist and SEA, and the implications for new water users were clearly identified.

32. *Therefore, the above-reported exceedence values for a period such as August 16 through October 31, which are quite low (e.g., below 50% likelihood value), would be even lower without the effects of regulation from PSE's Baker Project.*

Response: The reported exceedence values are based on the fifty years of flow records that embed the effects of flow regulation (augmentation from power generation and instream flow releases) from PSE's Baker Project and SCL's Skagit River Project. It is unknown at this time what changes could be anticipated from future operations of these upriver projects. There is no requirement in the proposed instream flow rule that PSE's Baker Project would have to maintain the instream flows measured at the Mount Vernon gage.

33. *It is clear that the exceedance values associated with the proposed instream flows were not considered for the proposed rule-making.*

Response: This statement is untrue. The expected frequency that instream flows would not be met, requiring new water right holder's to cease diversions, was widely discussed in public workshops and hearings, and in the environmental documents associated with rule development.

34. *The exceedance values during this period are artificially high due to the effects of existing hydropower operations; the proposed rules set instream flows at a level at which they would likely be met less than 30% of the time. This reality reflects the fact that the targeted flow recommendations represent an untenable benchmark and will result in regularly unachievable flows, thus making it improbable that new appropriations*

authorized after the effective date of the rule will be capable of being used (without, of course, impairment of senior appropriators upstream, as well as, significant augmentation).

Response: The water management issues related to the interruptible nature of new water rights has been fully disclosed. There is no attempt to have the PSE Baker River Project augment flow levels in the Lower Skagit.

35. *Relative to the historical median flow of 8,600 cfs for this period, the proposed instream value exceeds the median flow by 4,400 cfs, calling into question even more severely the scientific methodology relied on to set these regularly unachievable flows and the resulting water right use restrictions created by existing physical constraints not reflected or addressed by the proposed rule flow levels.*

Response: See Responses to Comments # 31-34. The instream flow rule does not require anyone to put water in the river to reach those instream flow levels. The instream flows listed in the rule merely state at what level flows are surplus to instream needs such as fish habitat and possibly available for new out-of-stream diversions.

COMMENTS: WATER AVAILABILITY DETERMINATION BASED ON INACCURATE ASSESSMENT OF EXISTING USES

36. *As such, the maximum withdrawal provision (WAC 173-503-030(2)) can result in impairment of existing rights if actual use of the water is greater than WDOE has estimated.*

Response: The proposed rule provides that if the amount of actual water use exceeds current estimates, Ecology is not bound to appropriate the entire amount determined to be available. This will have no effect on existing rights.

37. *It is our opinion that actual consumptive use, rather than the quantity of diverted water, should be considered when determining current water use with the ultimate goal of determining future water availability.*

Response: Ecology is not able to determine the actual consumptive use portion of every water right in the Skagit watershed. Therefore Ecology has made a policy decision that the instantaneous diversion or withdrawal associated with the water right will be the measure of actual water use.

COMMENTS ON POTENTIAL DETRIMENTAL IMPACT ON THE AQUATIC ENVIRONMENT

38. *Under this scenario, one can conceive of many scenarios under which inflows to PSE's Baker River Project would be insufficient to support augmentation of Skagit River flows to the proposed instream flow targets for an extended period. As a result, requiring PSE to augment streamflows during the initial period of an extended low-flow period with the possibility that insufficient water would be available to augment streamflows during the latter period of the low-flow period could actually have a direct significant, adverse impact on the aquatic environment.*

Response: See Responses to Comments # 6-8.

39. *WDOE's emphasis on steelhead spawning is likely to result in a 10% loss of chinook rearing habitat during the relatively short time chinook are present in the reach of the river affected by the proposed rule.*

Response: See the Response to Comment # 16.

COMMENTS ON POTENTIAL IMPACT ON ENERGY RESOURCES

40. *WDOE states that future hydroelectric operations could be used to augment streamflow during the "most critical low-flow months," and yet no specifics are given regarding the timing, quantity, and source of such releases.*

Response: Ecology's statement merely refers to the fact that existing hydropower operations regularly augment flows in the Lower Skagit mainstem. The use of the word "could" acknowledges that it is unknown whether such augmentation is a potential solution to low flow events.

41. *During periods when the proposed instream flows are not met, would WDOE expect the hydroelectric projects to release sufficient flows (if this were even theoretically possible) such that the instream flows on the Skagit River are met at all times?*

Response: See Responses to Comments # 6-7.

42. *Their (the instream flows set in SCL license) applicability to downstream resource protection is uncertain at best and their ultimate consistency with the downstream minimum instream flows proposed in this rulemaking simply has not been evaluated.*

Response: The proposed instream flow rule is not applicable to SCL's Skagit River Project.

43. *The model[3] assumed that the Baker River Project would be used to augment Skagit River streamflows during any period when the proposed instream flows were not met*

Response: See Responses to Comments # 6-7.

44. *This is because management of the Baker Project to maximize augmentation to the Skagit River would have caused available reservoir storage to be completely depleted by October 31, such that little water would have been available for augmentation during the entire month of November.*

Response: See Responses to Comments # 6-7.

45. *[O]peration of the Baker Project to maximize Skagit River augmentation would have resulted in 14 days during November with a Skagit River shortfall of 4,000 cfs or greater (compared with only 3 days under actual conditions), with a maximum single day shortfall of 6,552 cfs.*

Response: The Lower Skagit mainstem shortfalls are already acknowledged in the environmental documents associated with the rule. Also, see Responses to Comments # 6-7.

46. *This analysis highlights an important flaw in WDOE's proposed rule. The higher the instream flow target, the greater the augmentation necessary to meet the target and the greater the potential draft on the reservoir storage. (The higher that these flows are artificially maintained, the higher will be the subsequent incubation*

---

[3] Initial reservoir conditions were set based on actual water volumes held in storage in each of the Baker River reservoirs at the end of August 15, 2000 (note that both reservoirs were relatively full on this date, reflecting typical storage patterns for this time of year). Project operation was simulated using a daily time-step, as follows: First, estimated reservoir inflows were added to the water stored in the reservoirs at the end of the previous day. Next, based on water availability in the Baker Project reservoirs, the Lower Baker Project was assumed to discharge an amount of water to the Skagit River for generation purposes equal to the amount actually used for generation on that given day (i.e., contingent on water availability, simulated discharge was assumed to equal actual discharge used to generate power at the Lower Baker Project during 2000). Based on the simulated discharge to the Skagit River from the Baker Project, the Skagit River streamflow at Mt. Vernon (USGS 12200500) was compared with WDOE's proposed instream flow to evaluate whether the proposed instream flow was met. If the instream flow was met, no further discharge from the Baker Project was assumed. However, if the instream flow was not met, the model was used to simulate additional releases from the Lower Baker River Project, subject to physical constraints, with the objective of releasing sufficient water to augment Skagit River flows to the level of WDOE's proposed instream flow. As a final step, Skagit River streamflow was adjusted accordingly in the model to reflect the simulated operation of the Baker Project.

flows necessary to protect the eggs spawned during the early fall months.) WDOE is suggesting a new water management paradigm that not just affects instream flows, it directly impacts the use of stored water on a long term basis and could threaten the ability of the upstream storage operators to meet load demands from their customers which was the primary reason that the storage facilities were built in the first place.

Response: Ecology is not making the Lower Skagit mainstem instream flows applicable to the Baker River Project. See Responses to Comments # 6-7. The use of reservoir storage to provide incubation flows to protect eggs spawned during the fall months in the mainstem Skagit River below Concrete will be an issue for the relicensing of the Baker River Project.

COMMENTS ON WDOE'S FAILURE TO CONDUCT AN ECONOMIC ANALYSIS AS A PREREQUISITE TO COMPLETING THE RULEMAKING PROCESS

47. *Federal and state law require WDOE to prepare and be guided by an economic analysis of the impacts of any change to its water quality standards prior to the adoption of any new water quality rules.*

Response: The proposed instream flow rule is not related to the state water quality standards (Ch. 173-201A WAC). It does not change any water quality criteria or use designations in the standards. A Small Business Impact Statement was incorporated into the CR-102 form filed with the Code Reviser for publication of the proposed rule. A Benefit/Cost analysis that documents that probable benefits of the proposed rule are greater than the probable costs is required to be placed in the rule making file prior to adoption (RCW 34.05.328 – the Administrative Procedures Act). The evaluation of probable benefits and costs of the rule arrived at the final judgement that probable benefits exceeded its probable costs.[4]

48. *Under state law, WDOE's water resource decisions are required to be designed to achieve "maximum net benefits" from both diversionary and instream uses of the public waters. RCW 90.03.005; RCW 90.54.020(2). Has WDOE prepared any such analysis?*

Response: The "maximum net test" is not required under the Administrative Procedures Act. Section 328 of the APA simply requires that probable benefits associated with the proposed rule exceed probable costs. The Benefit/Cost analysis was completed prior to the time of rule adoption (which was held on March 12, 2001).

COMMENTS: WDOE'S RULES VIOLATE THE STATE ANTIDEGRADATION POLICY AND EXCEED WDOE'S AUTHORITY

49. *The antidegradation policy requires, as WDOE is certainly familiar, for WDOE to maintain and protect and allow no further degradation of existing beneficial uses. WAC 173-201A-070(1)*

Response: See Responses to Comments # 6-7. The proposed rule is not intended to modify the operations of PSE's Baker River Project. Setting instream flows in the Lower Skagit mainstem will protect beneficial uses from degradation and maintain water quality during critical times of the year.

50. *If it is WDOE's intention to achieve reallocation of existing water rights by requiring PSE to modify its diversionary, storage, or release rights to the benefit of junior appropriators, the only legal method for such reallocation under state law is condemnation of PSE's water rights.*

Response: See Responses to Comments # 6-7.

---

[4] The estimated fisheries benefits range from a discounted present value of $3.1 million to $9.4 million depending on the treatment of time ("Evaluation of Probable Benefits and Costs. Chapter 173-503 WAC. Instream Resources Protection Program. Lower and Upper Skagit Water Resources Inventory Area (WRIA 3 and 4)." Washington Department of Ecology, Olympia, Washington, March 12, 2001).

51. To the extent WDOE's rule is made in reliance on its intention to, as a result of the rule being considered an "other requirement of state law" under 401(d), and thereby limit the exercise of PSE's water rights through the imposition of the proposed rule flows in the FERC licensing process, the rule is directly in conflict with its statutory mandate to the contrary. A rule directly in conflict with WDOE's statutory delegation of authority would also conflict with federal law.

Response: This is not a comment on the proposed rule itself. Please see Responses to Comments # 6-7.

52. Although WDOE is relying on the 401 water quality certification process, where no such federal v. state pre-emption question is directly presented, to bootstrap the proposed flows onto future FERC licenses, WDOE would have to require the impairment of existing water rights and violate the antidegradation policy. The Court has determined that, in issuing a 401 water quality certification, the state must comply with its antidegradation rule. PUD No. 1 v. WDOE, 511 U.S. 700 (1994).

Response: Ecology's Section 401water quality certification for the relicensing of the Baker River Project is a separate matter.

COMMENTS ON DELAYING ADOPTION OF THE PROPOSED RULE

53. PSE recommends withdrawal of the DNS, and issuance of a DS to allow for an appropriate and detailed environmental impact statement.

Response: The decision to issue a DNS or DS was based on an assessment of probable adverse environmental impacts. Having reviewed the comments and taken public testimony, Ecology has not discovered any new adverse consequences of the proposed rule that would require withdrawal of the DNS.

54. Additionally, PSE recommends deferral of setting instream flows until the ESHB 2514 watershed planning is completed for the basin.

Response: This issue was discussed in the SEA (see pp. 22-24, "Implementation of the Watershed Management Act").

55. PSE also, by attaching the letter from R2 Resource Consultants, Inc., repeats its request for additional data that would allow PSE to provide meaningful comments on the proposed rule and DNS.

Response: Responses to the comments to R2 Resources Consultants, Inc. follow, below.

56. PSE requests the comment deadline be extended to allow PSE to complete its analysis of the date requested and provide further comments.

Response: Ecology doesn't think this is necessary. PSE's comment were mostly focused on three areas: 1) the validity of instream flow methodologies; 2) the role of professional judgement; and 3) the purported effects of proposed rule on the Baker River Project.

Those comments that question the adequacy or documentation of the instream flow setting process are noted. PSE has been provided all the instream flow studies that are available. Additional documentation on the instream flow methods would have to be created after-the-fact. This is beyond the informational basis upon which Ecology decided to move ahead with rule-making. Also, the thrust of PSE's comments was to speculate that other methodological approaches may be more appropriate, and any additional information that Ecology might provide would likewise be subject to such conjecture.

Some of the comments related to the methods employed to establish instream flows question the role of professional judgement in this process. Ecology believes professional judgement is an indispensable part of developing instream flow recommendations.

The comments on the effect of the proposed rule on the Baker River Project are wrongfully based on the assumption that stored waters would be drafted to meet instream flows measured at the Mount Vernon gage.

Written Comments of Phil Hilgert, R2 Resource Consultants, Inc., on behalf of Puget Sound Energy, Inc.

1. *[W]e need additional information… in order to evaluate the technical information used to support the proposed rule.*

   Response: PSE has been provided all the technical information that has been put together in decision-support documents. These documents synthesize field notes and committee decision-making into a format that is understandable and accessible. There are so many decisions that lead to a final instream flow recommendation that it is virtually impossible to guarantee that adequate documentation can be provided at all points.

2. *If an instream flow study is initiated in the mainstem Skagit River below Concrete in the near future, it will be important to establish a sound basis for any technical decisions used to support the proposed Rule that might affect future instream flow studies.*

   Response: The comment is noted.

3. *What percentage of the total number of mainstem Skagit River chinook and steelhead redds are located below RM 24.3?*

   Response: The precise number of redds that occur below RM 24.3 is not known, but it is expected to be small. Over 70% of the chinook spawning occurs in the reach above Rockport.

4. *What data were used to support use of the critical reach concept to determine instream flow requirements to protect spawning salmonids?*

   Response: The instream flow study only addressed the area up to Sedro Woolley. Within the study reach (Puget Sound to Sedro Woolley) the only place where spawning has been observed is in the vicinity of the two spawning transects. Although some potentially spawnable habitat occurs downstream, according to area biologists no spawning has been observed there.

5. *Please provide a citation for Beecher (1994) referenced on page 16 of the technical report on the Lower Skagit River Instream Flow Studies prepared by DES (1999).*

   Response: In the References section (page 139), the technical report listed the author as Washington Department of Fisheries. The correct citation is the *WDFW-WDOE Instream Flow Study Guidelines (WDFW, WDOE, Olympia, WA, 1994).*

6. *What site-specific data were used to determine that the center of the mainstem Lower Skagit River channel (e.g. 52% of the channel) is not used by rearing juvenile salmonids? What was the lowest mainstem flow under which these data were collected? How were these data used to verify that the middle portion of the channel was not usable by juvenile salmonids?*

   Response: A variety of site-specific data were used to make the determination that the center of the mainstem is not used by rearing juvenile salmonids. Included in this were Hal Beecher's snorkeling observations (September) in upper Skagit, snorkeling by Duke (including Beecher on one occasion in April), underwater video by Duke, professional opinion (based on varied experience) of Eric Beamer (Skagit System Cooperative, La Conner, WA), Gary Engman (WDFW), Brad Caldwell (Ecology),and others. Beamer's experience is the most extensive for the Skagit and he concurred with the findings of the Instream Flow Committee.

7. *What information was used to quantify the distribution of habitat types used in development of the preference curves?*

   Response: Unfortunately, the framing of this question was not clear to the biologists on the Instream Flow Committee.

8. *What was the number and size of the juvenile chinook salmon directly observed in areas where the mean column velocity exceeded 1.5 feet per second?*

   Response: Dr. Hal Beecher, WDFW, provides the following velocities and size of juvenile chinook, where the mean column velocity exceeded 1.5 feet per second:

   23 out of 77 in velocities > 40 cm/sec (1.3 ft/sec) – Dungeness River
   5 out of 13 in velocities > 43 cm/sec (1.4 ft/sec) – Chiwawa River
   6 out of 49 in velocities > 46 cm/sec (1.5 ft/sec) – Mad River
   2 out of 31 in velocities > 55 cm/sec (1.8 ft/sec) – Tucannon
   (These fish were 5-10 cm in length. Dr. Beecher used different intervals in different rivers because of differing availability of velocities at each site. Dungeness River observations included fish in velocities >82 cm/sec.)

9. *Please provide a copy of the raw field data of fish observations and an Excel file containing data associated with measurements of fish observations within the study reach. Include the time of day, water temperature and length of each fish used to develop or modify criteria curves.*

   Response: PSE has been provided all the instream flow studies that are available. Additional documentation on the instream flow methods would have to be created after-the-fact. This is beyond the informational basis upon which Ecology decided to move ahead with rule-making. In addition to field data, the Committee used information from other sources. The field data PSE is requesting has only been provided to Ecology in the summary documents created to document the entire instream flow-setting process. The Technical Appendix to the Instream Flow Report contains all the available field data.

10. *To what extent was the frequency that various flow levels occur in the mainstem Skagit River within WRIAs 3 and 4 considered when developing the proposed instream flow requirements?*

    Response: Substantial consideration was given to hydrographs and actual flows, including frequencies of common and infrequent flows at each season.

<u>Written Comments of Eric Espenhorst, Friends of the Earth</u>.

1. *Considering how flows affect conditions in the estuary is a useful addition and correction to the flawed IFIM methodology. Results from IFIM modelling are often limited by consideration of habitat types (Armour and Taylor, Fisheries, 1989), sampling and measurement problems associated with representing a river reach with selected transects and with the hydraulic and substrate data collected at the transects, sampling and measurement problems associated with developing the suitability curves, and problems with assigning biological meaning to weighted usable area. (Castleberry et al., Fisheries, 21(8)) Including consideration of the estuary cannot, however, fully eliminate the shortcomings with IFIM.*

   Response: This rule attempts to overcome any shortcomings of the IFIM process by considering additional factors such as the estuary considerations.

2. *[T]he Skagit River has lost 59% of its delta's tidal marsh, primarily by diking. Consequently, the estuary conditions that inform the decision on flows are altered and impaired. Second, the need for instream flows is distorted by the simplified channels. Third, the effect of withdrawals is compared to current conditions, rather*

than natural conditions. These factors mask the effects that current conditions have on the river, fishery resources, and aquatic biota that evolved with a natural hydrograph and an estuary that was influenced only by natural processes. If you study instream flows with a restored estuary and restored channels including floodplain connectivity, you will likely find the need for additional water to maintain hydrologic functions and restore fishery resources.

Response: These concerns are beyond the scope of the proposed rule. We cannot determine the correct instream flow for a theoretical channel that does not exist. We can only measure and provide protection for an existing channel. If the Skagit River's channel is someday permanently modified to a new shape, then it may be appropriate to review the instream flow at that time.

3. *I am concerned that Ecology does not have the staff to ensure that withdrawals due to new permits will be curtailed when river flows fall below specified levels.*

Response: The comment is noted.

4. *In light of the uncertainties regarding implementation and recovery, Ecology should not issue any new permits. Secondarily, Ecology should make new permits conditional and subject to review in 10-20 years.*

Response: The concerns over compliance with the conditions on the newly issued water rights will continue to be addressed by Ecology. However, Ecology will proceed with issuing water rights once the proposed rule is effective.

Written Comments of Linton Wildrick, Pacific Groundwater Group.

1. *Section 030: Seems to say that the minimum necessary flow is 830 cfs, then say that appropriations exceeding 830 cfs will be bad for fish. Of course, it would – the river would be dry.*

Response: This is a misreading of the proposed rule. Minimum flows are in the range of 10,000 to 13,000 cfs.

2. *Section 050: I assume that the additional amount that can be appropriated from the basin refers to cfs of streamflow. So, how will the rate of surface-water appropriation due to ground-water withdrawal be assessed?*

Response: Groundwater withdrawals will be treated as surface water appropriations unless the applicant can demonstrate the withdrawal is not hydraulically connected to the river.

3. *Section 060: It is incorrect to suggest that some part of the groundwater in the basin is not in hydraulic continuity with surface water somewhere in the basin or Puget Sound, so why suggest that the Department might find otherwise? Why does the Department even need to check this possibility: It should simply assess, using common scientific methods, whether fresh surface water will be captured by the withdrawal.*

Response: The determination whether ground water is in hydraulic continuity with surface water can define the degree and timing of interference with surface waters. On the basis of these findings it can be possible to condition a new permit to mitigate the effect of ground water pumping on surface waters. If an impact cannot be mitigated or avoided, the application may have to be denied.

Written Comments of C.W. Crider, Skagit/Island Counties Builders Association.

1. *Hydrology cannot solve the salmon problem alone nor can Habitat, Hatcheries or Harvest.*

Response: The comment is noted.

2. *In the Lower Skagit TMDL Study, DOE indicates that sewage treatment plants in the various cities are discharging into the river under NPDES permits. Maybe these permits need to be reviewed.*

   Response: The permits for the five sewage treatment plants on the Lower Skagit mainstem are being reviewed and reissued pursuant to the Lower Skagit TMDL Study.

3. *Non-point sources of pollution are also mentioned but under this plan, DOE has not taken into consideration the requirements for "buffering" from streams and other wetlands in the interest of clean water.*

   Response: The instream flows proposed for the mainstem Skagit River are roughly double the critical parameter levels at which water quality studies model the river. This conservative approach in fact "buffers" the river. Non-point TMDLs on tributaries are just beginning to be addressed. Buffering streamflows in these chronically low-flow areas will be more difficult and could require innovative techniques to put water back into streams.

4. *Will DOE actually go against language such as this and actually rule that a certain ground water application will not affect the flow? (Reacting to the Governor's comments that "all water removed from the earth through wells and other avenues affects the level of water in different rivers throughout Washington.")*

   Response: The determination of hydraulic continuity in section 060 will rarely result in a finding that ground water is not in continuity with surface water. As stated above, that is not the intent of the proposed rule; the intent is to identify the degree and timing of interference with surface water.

5. *Exempt wells will also be counted against the total allotment.*

   Response: They have been estimated in the total withdrawals.

6. *Basing flow and availability for water rights on only one month of service by the river seems a little out of perspective when 6 other months enjoy the same volume.*

   Response: If this comment is in regard to the determination of water availability, it was Ecology's decision that the most critical low-flow period of the year (August – October) is the appropriate period for assessing water availability. This was reasonable since this is the period when water use is highest and availability the lowest.

7. *The proposed 200 cubic feet /second proposal is over and above the pending water rights applications and the current water rights in use.*

   Response: The proposed 200 cfs includes the pending applications, but not the current water rights in use (which were subtracted from the total allowable water rights).

8. *It has been said that if a development is on public water supply it won't be affected. I would question this since water for public water supplies comes from this river and basin as well.*

   Response: Public supplies are mostly senior in priority to the proposed rule. Water supply storage also will allow public supplies to be available during periods when new rights are curtailed.

9. *Why the differentiation between tribal and non-tribal exists is unfathomable – but it does (exist) even in the DOE proposed document.*

   Response: The clear separation between tribal, federal and state rights has been respected by Ecology in all previous instream flow rules and is based on the nature of those rights.

10. *While the 200 cubic feet per second is only a proposal and is a lot of water, it is recommended that DOE re-evaluate this proposal and push the percentage to 4% rather than the 2% proposed.*

    Response: The comment is noted.

11. *If DOE will allow a total of 4% and monitor the water rights and shares as they propose, there should not be a need to revisit this issue for many years to come given the population growth projections for the area over the next few years.*

    Response: The comment is noted.

12. *A fish will not be able to discern the difference between 200 and 400 cubic feet per second being drawn from the river and won't have to for quite a few more years.*

    Response: The difference would be measurable in regard to the amount of available salmon habitat.

Written Comments from Larry Wasserman, Skagit System Cooperative.

1. *We believe the instream flow levels established in this rule are an appropriate exercise of the State's obligation to act to protect anadromous (fish) in the lower Skagit River and the four … tributaries.*

   Response: The comment is noted.

2. *The rule does not address the senior water rights held by the Tribes, which are issues more appropriately addressed in other forums.*

   Response: The comment is noted.

Written Comments of William F. Paleck, National Park Service.

1. *The United States believes that it holds inchoate Federal reserved water rights for the primary purposes for which the park units were created. These water rights include instream flow rights as well as providing water for visitors and park staff at campgrounds, visitor centers, and other administrative uses. These water rights would be senior to the proposed rule and would therefore not be affected by the conditions outlined in the rule.*

   Response: The comment is noted.

Written Comments from Tom Paulus, Bayview Farms, Inc.

1. *First, the justification for the proposed flow levels is not transparent or empirically based on measures of actual fish survival; that is, it is not clear from the supporting documents why a range of 10,000-13,000 cfs in the Skagit River is needed. The supporting environmental analysis (largely based on IFIM) does little to explain whether empirical data has been used to measure actual fish survival within a stream reach (essentially what IFIM estimates produce).*

   Response: Many types of field studies were conducted for the Lower Skagit Instream Flow Study. Actual observation of fish use was a part of the field work. Actual fish survival is extremely difficult to determine for each lifestage of each species for each month for each reach of river. Various flow levels would have to be maintained consistently without any influence from uncontrolled high flows. This is not possible. Since each

year would only produce one data point, many decades would be required to determine reliable fish survival relationships. Also, all other mortality factors would have to be separated out and quantitatively identified (fish competition, predation, food supply, water quality, etc.) Therefore, Ecology has had to focus on protecting and preserving fish habitat to protect fish when new water diversions are proposed. The IFIM study was the appropriate method of providing quantitative information on how fish habitat relates to river flow.

2. *Consequently, it is recommended that the proposed instream flow levels be formally designated as tentative, and the proposed rule require an automatic re-evaluation of the flow levels in five years.*

   Response: The proposed rule is a final rule; however it does contain provisions for further review when conditions warrant.

3. *The section (050 (3)) should be changed. The section should not withdrawal from appropriation the issuance of further water rights after the 200 cfs allocation, but instead re-evaluate whether measurable impact to fish survival, and system hydrology, actually exist.*

   Response: During the course of implementing the allocation, Ecology will continue to review the circumstances of the determination of water availability. In fact, every time Ecology issues a new water right it will have to review the current state of knowledge about the amount of existing rights and water remaining potentially available. The withdrawal of the allocation after the 200 cfs has been allocated will include a review of the existing rights and the viability of the 200 cfs figure.

4. *The supporting documentation does not provide any kind of economic analysis to justify why society should accept the proposed flow regimes—what are the opportunity costs to local residents and the state as a result of accepting the proposed rule?*

   Response: A Small Business Impact Statement was incorporated into the CR-102 form filed with the Code Reviser for publication of the proposed rule. A Benefit/Cost analysis was filed with the CR-103 form at the time of adoption (March 12, 2001).

5. *The rule should state explicitly that it has not been based on any kind of formal economic analysis, and it has not addressed economic impacts in its formation.*

   Response: See Response #4 above.

6. *The Water Resources Program within the Dept. of Ecology has often lost sight of its primary responsibility to Washington State citizens; ensure that adequate water supply is make available for social and economic benefits.*

   Response: The retention of instream flows in perennial streams is a stated purpose of the Water Resources Act of 1971 (RCW 90.54.020(3)). Providing adequate water supplies is also a stated objective (RCW 90.54.020(4)). The proposed rule balances the need to protect valuable fish habitat and provide water for social and economic benefits.

<u>Written Comments of Hal Beecher, Washington Department of Fish and Wildlife.</u>

1. *The instream flow protection proposed in this draft rule will be, if adopted and enforced a significant contribution toward protection of fish habitat, including habitat for chinook salmon and bull trout, which are both listed under the federal Endangered Species Act.*

   Response: The comment is noted.

Written Comments of Steve Aslanian, Skagit Audubon Society.

1. *We especially champion Ecology's efforts to recognize the significance of estuarine habitat with the importance of maintaining the levels of flows necessary to protect this environment.*

   Response: The comment is noted.

Written Comments of Bill Reinard, private citizen.

1. *Implementing the rule proposed to set Skagit River instream flows while failing to fill the river system with returning salmon is placing the cart before the horse.*

   Response: Instream flow rules are intended to protect the flows necessary to create adequate and suitable habitat for returning salmonids.

2. *If there is a thread of authority within you agency to restrict salmon harvest then you will be negligent in not doing so.*

   Response: The comment is noted. Ecology has no authority over harvest issues.

Written Comments of Scott Fowler, Dahlman Pump & Well Drilling, Inc.

1. *Has this rule looked at the financial burden to the taxpayers of Skagit County to run public water countywide?*

   Response: A Small Business Impact Statement was incorporated into the CR-102 form filed with the Code Reviser for publication of the proposed rule. A Benefit/Cost analysis will be filed with the CR-103 form that is filed at the time of adoption.

2. *Will or does DOE look at total use and recharge of the exempt well?*

   Response: Ecology will estimate the actual water use from exempt wells using average regional water use figures, but won't include the recharge portion. Ecology is going to manage water use based on instantaneous withdrawal and diversion amounts. To do otherwise would be unmanageable.

3. *Does DOE recognize the benefits wells have on instream flow (i.e., withdraws from deep confined aquifers that recharge shallower aquifers through septic system and irrigation?*

   Response: This is a debatable point; Ecology does not believe this position is accepted by the general scientific community.

4. *Can DOE tell me why it is better to have central withdrawals of water (surface or ground water) than small exempt systems?*

   Response: The reasoning is based on the observation that large, centralized water supply systems draw from large sources. In Skagit County this source is the Lower Skagit mainstem. The Skagit PUD is proposing to restrict the amount they draw from the Cultus Mt. Tributaries and will pump from the Skagit River during periods when flows are low in the tributaries. This appears to be an environmental benefit since the Cultus Mt. Tributaries will continue to flow during low-flow summer months and the small amount that would be diverted from the Skagit River would be relatively small. Exempt wells are virtually everywhere, including adjacent to small tributaries that dry up in the summer. Clusters of these exempt wells could have a detrimental effect on these small streams.

5. *By setting instream flow for the lower Skagit, weren't we getting ahead of ESHB 2514? It appears that once they are set, the upper Skagit is stuck with this decision.*

   Response: This issue was discussed in the SEA (see pp. 22-24, "Implementation of the Watershed Management Act").

6. *This decision would only give PUD, the City of Anacortes, and the Tribes water rights. It will not guarantee any other applicant a right even though some have been on the list longer.*

   Response: This rule does not give any party a water right. Applications for water rights will be processed beginning with the ones that have been waiting the longest.

7. *Seattle City Light is not and will not be obligated to discharge water at low flows. Puget Sound Energy is in the process of re-authorizing their hydro permits. Doesn't this put ambiguous pressure on Puget Sound Energy?*

   Response: See Responses to Comments # 6-7 submitted by Puget Sound Energy.

8. *If the goal is to provide 92% of maximum Chinook habitat, what is the amount of habitat available at the average flows for August and September? How much does fish production go up to justify the high flow levels?*

   Response: The goal is not to provide 92% of maximum chinook habitat. The goal was to arrive at a minimum instream flow that would protect and preserve the whole fish community since many species and lifestages coexist simultaneously. In certain months one lifestage may have a higher priority when it is the most active lifestage and it can be accommodated without hurting the other lifestages. The habitat values from the IFIM study were not the only information considered. Many factors affect fish production besides the quantity of fish habitat. The biologists used their professional knowledge of fish production and fish habitat to determine the best compromise flow for both spawning and rearing lifestages of different species. The mean monthly flows for August are 10,600 cfs and for September they are 8,350 cfs. The maximum amount of chinook rearing habitat is 24,909 sq. ft./1,000 linear feet of stream. August mean flows provide 23,908 sq.ft/1,000 ft. or 96% of the maximum potential chinook rearing habitat. September mean flows provide 24,811 sq.ft/1,000 ft. or 99.6% of the maximum potential chinook rearing habitat.

   The maximum amount of chinook spawning habitat is 183,129 sq. ft./1,000 linear feet of stream. August mean flows provide 163,247 sq.ft/1,000 ft. or 89% of the maximum potential chinook spawning habitat. September mean flows provide 127,235 sq.ft/1,000 ft. or 69% of the maximum potential chinook spawning habitat.

   We do not know how fish production will actually respond, because there are so many factors that account for the number of fish that return.

9. *Does DOE or the Department of Fish and Wildlife know the percentage of fish loss due to low flow compared with other hazards (i.e., predators, saltwater condition, harvest, etc.)?*

   Response: No.

10. *If a farmer in the Skagit Valley has or wants an irrigation well, who will pay for the studies to determine if he does have an impact on instream flow and what time does that impact happen?*

    Response: The cost of the studies will be the responsibility of the applicant.

11. *How much of the lower Skagit is charged with ground water? If all the irrigation wells are being pumped to their maximum rate, what is the impact to the Skagit instream flows?*

Response: Ecology does not have this information. The ESHB 2514 watershed planning process is developing such information in the Samish Basin at this time. Potentially these findings can be applied to other areas in the Lower and Upper Skagit Watershed.

12. *How much water is not being recharged back to the Skagit (i.e., City of Anacortes, Tribes, Whidbey Island, Lake Samish, etc.)? Is the sewage recharge from Sedro Woolley, Burlington, and Mount Vernon being taken into account?*

    Response: The net loss from the sewage treatment plants that discharge outside the lower Skagit River watershed is not known. The recharge from Sedro Woolley would be accounted for at the Mount Vernon gage, whereas Burlington and Mount Vernon discharge below the gage and would not be taken into account.

13. *If instream flows are set for the lower Skagit, will funding still be provided for ESHB 2514 for the upper Skagit?*

    Response: Yes, funding will continue to go to the ESHB 2514 planning process.

14. *The MOA was issued in 1996 after it appeared we would have new county commissioners. Comment period closes before the new county commissioners take office.*

    Response: Even though the new county commissioners were not officially in office when the public comment period closed, the public workshop and hearing were opportunities for them to become familiar with the proposed rule. At least one of the new commissioners attended both the workshop and the hearing and was encouraged to comment on the proposed rule.

Written Comments for Bruce Fowler, Dahlman Pump and Well Drilling, Inc.

1. *I do not favor the transfer of water rights to the mainstem of the Skagit to insure water in the tributaries they now use.*

   Response: See Response to Comment #4 by the previous commenter.

2. *Anacortes and the Tribes have asked for more water than the growth plans under GMA will require.*

   Response: This comment is noted.

3. *[It was said at the time the MOA was signed in 1996 that the] MOA will not have an impact on the "exempt well." However, at the last public hearing you stated that exempt wells would be junior to proceeding water rights. How can DOE make exempt wells junior?*

   Response: Ecology has not proposed to limit the statutory right to develop an exempt well. Ecology has made statements in the environmental documents and public hearing to clarify that an exempt well is only exempt from permit requirements. It becomes a water right when it is drilled and put to beneficial use. It has a priority date (the date it is put to beneficial use) and could be junior to the instream flow if put to beneficial use after the effective date of the rule. The priority date of the exempt well could become important during a time of scarcity when senior rights would have to be protected.

4. *Does DOE have any solid proof that an exempt well or group of exempt wells has a negative impact on instream flow?*

   Response: No information that would relate to this comment has been available for the environmental documents or public hearings. This is not to say that the information does or does not exist.

5. *How does this plan fall under the existing Critical Area Ordinance of Skagit County?*

   Response: The proposed rule has little relationship to the existing Critical Areas Ordinance of Skagit County. The proposed rule establishes instream flows and makes an allocation of water available. Neither of these issues are covered by the CAO. The proposed rule doesn't address closures or low-flow status of tributaries, which is an area where the CAO has tried to link to Ecology's water management for the purpose of protecting aquifer recharge areas. The Skagit County CAO has taken Ecology's list of closed or low-flow tributaries and created sensitive aquatic zones along these streams where restrictions on exempt wells are reasonably imposed.

6. *You stated we have about 200 cfs available in the Skagit with roughly 132 cfs pending and 52 cfs unclaimed. This leaves the resident of Skagit County with roughly 16 cfs of water available for the future.*

   Response: Most likely the 52 cfs would also be available for future rights. Future water needs in all of Skagit County are apparently well within the total accounted for by existing rights and water rights presently applied for.

7. *Lastly, you stated that Ecology does not look at recharge from septic, irrigation or sewer systems that treat and discharge back into the system.*

   Response: Ecology has chosen to manage water use based on the instantaneous withdrawal or diversion amounts. To do otherwise would be extremely difficult and imprecise.

Written Comments of Joan Crook, Washington Environmental Council

1. *The Washington Environmental Council supports adoption of the proposed rules to establish instream flows for the Lower Skagit Mainstem and Cultus Mountain Tributaries and the limitation of total out-of-stream diversions for the protection of the Skagit estuary.*

   Response: The comment is noted.

2. *In this rule, the important functions of the estuary are recognized and the flows that contribute to maintaining them are protected. This is a substantial improvement in the process and should make a considerable contribution to maintaining the health of the overall system.*

   Response: The comment is noted.

3. *There has been a serious effort to base this proposal on the results of scientific assessments. We encourage continuing study and monitoring of the basin to evaluate the decisions made to date and guide the allocation decisions which the department makes in the future.*

   Response: The comment is noted.

Written Comments of Roy Metzgar, City of Everett Public Works

1. *Sec. 173-503-030 (1): Near the beginning change "or" to "and" so that it reads: "Ecology finds that (1) The magnitude and variability of flows are important."*

   Response: The comment is noted.

2. *Section 173-503-030 (3): The last sentence should be rewritten thusly:*

"Total withdrawals greater than 830 cubic feet per second during the month of September will not protect and preserve fish, wildlife and other environmental values and therefore would be in violation of chapter 90.54 RCW and, thus, harmful to fisheries resources and the aquatic ecosystem in the region covered by this rule."

Response: The comment is noted.

3. *Section 173-503-050 (1) and (2): Combine subsections (1) and (2). These sections are misleading as organized and written. If there is a technical basis or policy justification for "interruptable rights," then Subsection (2) should be combined with the Subsection (1). That is, 200 cfs stated to be available to be appropriated, is not the case, but rather is an interruptible 200 cfs. Furthermore, Subsection (2) (revised) should identify the time when a granted withdrawal could be expected to be interrupted (the usual low flow period?).*

   Response: The comment is noted.

4. *Also, the basis or cause for interruption of withdrawal should be stated in a revised Subsection (2).*

   Response: The comment is noted.

Written Comments of John Phipps, Mt. Baker-Snoqualmie National Forest

1. *The Forest Service recognizes the need for and supports the establishment of instream flows to support those elements of the aquatic and terrestrial ecosystem dependent on those flows.*

   Response: The comment is noted.

2. *[T]he United States believes that it holds inchoate Federal reserved rights for the purposes for which the Forest Reserves were established. These water rights include water for administrative sites, water for growing trees and preventing or fighting forest fires, and instream flows for maintaining favorable conditions of water flow. These rights, if affirmed by the courts, would be senior to those in the proposed rule and would not be diminished by conditions by conditions in the rule.*

   Response: The comment is noted.

Written Comments of Brian Rhodes, Equilon Company

1. *I believe that the assumption that only 1.3% of the mean River Flow is still available is overly conservative on the face of it.*

   Response: The purpose of the proposed instream flow rule is to protect, restore and enhance fisheries. Water availability is low because the proposed instream flows are set a levels necessary to protect high value resources at critical times of the year.

2. *(Is) Ecology is willing or able, to demand that users stop using water in sufficient quantities to meet the needs of fisheries resources?*

   Response: The proposed rule will only apply to new water rights; senior rights are not affected. It is Ecology's responsibility to insure that permits conditioned with the instream flows cease diversion or withdrawal when flows fall below the levels in the proposed rule.

3. *Does Ecology plan to apply different standards to different rivers?*

   Response: Yes. Instream flows are set with information specific to each river, and often for different segments and tributaries. Each segment could potentially have different protection requirements based on the nature of the habitats and fish usage patterns found in each of them.

4. *I think that the basis for determining the instream flows for the Skagit River are overly conservative and that Ecology and related scientists should revisit the basis for these assumptions*

   Response: The proposed rule is a final rule with provisions for further review when conditions warrant.

5. *Do the proposed regulations allow for increased withdrawal and storage during high flow months if necessary or only reduced withdrawal during low flow months?*

   Response: No. It was Ecology's decision that the most critical low-flow period of year (August – October) is the appropriate period for assessing water availability. This was reasonable since this is the period when water use is highest and availability the lowest.

V. Summary of Public Involvement Actions

To effectively communicate Ecology's intention to establish a rule setting instream flow for the Skagit River, the following actions were taken.

- ### Workshop Dates and Locations

Two workshops were held to present information related to the Skagit River instream flows.

September 22, 1999, at the Skagit Public Utility District No. 1, Mount Vernon, Washington. This workshop was co-sponsored by the Skagit County PUD No. 1, City of Anacortes, Skagit County, Swinomish, Upper Skagit, and Sauk-Suiattle Tribes, Washington Department of Ecology, and Washington Department of Fish and Wildlife. The purpose of the workshop was to introduce the public to the joint recommendations that came out of the Skagit River Instream Flow Committee. Eleven persons from the general public attended the workshop.

October 12, 2000, at the Skagit Valley Community College, Mount Vernon, Washington. This workshop was held to present the draft of the proposed instream flow rule to the general public. Ecology presented background information about the rule-making process and distributed copies of the draft rule. A lengthy discussion period was provided to answer questions about the draft proposed instream flow rule. About 45 persons were in attendance.

- ### Hearing Dates and Locations

November 29, 2000, at the Skagit Valley Community College, Mount Vernon, Washington. The official public hearing was held to take testimony from the public. An informational presentation on the proposed rule and SEPA environmental documents preceded the public hearing portion. One person testified in favor of the rule. About 35 persons were in attendance.

- ### Mass Mailings

Ecology had several opportunities to send out mass mailings on the proposed instream flow rule. The first opportunity was in conjunction with the Public Workshop held on October 12, 2000. A Meeting Notice (Ecology Publication No. 00-11-006, September 2000) was prepared for statewide distribution and mailed out to approximately 1500 interested parties and media contacts in mid-September, 2000. A News Release (#00-194) was issued from Ecology's Northwest Regional Office on October 3, 2000. Both notices were posted on Ecology's web page.

A second mass mailing occurred at the time of the publication of the proposed rule in the Washington State Register on November 1, 2000. A Comment Period and Hearing Notice (Ecology Publication No. 00-11-006, November 2000) was mailed to approximately 1500 interested parties. Approximately 50 people also received the SEPA Determination of Nonsignificance, Environmental Checklist and Supplemental Environmental Analysis. The hearing notice and documents were posted on Ecology web-page.

- ### Display Ads, Press Releases

Display ads were placed by Ecology for a public meeting and the hearing:

- Meeting Notice for proposed rule, Skagit Valley Herald, 10/02/00; Anacortes American & Sedro Wooley Courier Times, 10/04/00
- Comment Period and Public Hearing Notice, Skagit Valley Herald, 11/21/00; Skagit Argus and Sedro Woolley Courier Times, 11/22/00

Press releases were issued on 10/03/00, 3/19/01

Appendices

Appendix A

Copies of all written comments and corresponding comment numbers

Appendix B

List of individuals providing oral comments and corresponding comment numbers.

List of individuals providing oral comments:

Judy Turpin, representing Washington Environmental Council, at the DOE Public Hearing, 11-29-00. [Turpin Comments #1-3]

List of individuals providing written comments:

Pamela Krueger, representing Puget Sound Energy, Inc. [PSE Comments #1-56]

Phil Hilgert, R2 Resource Consultants, Inc., representing Puget Sound Energy, Inc. [Hilgert Comments #1-10]

Eric Espenhorst, Friends of the Earth. [Espenhorst Comments #1-4].

Linton Wildrick, Pacific Ground Water Group. [Wildrick Comments #1-3].

C. W. Crider, Skagit/Island Counties Builders Association. [Crider Comments #1-12]

Larry Wasserman, Skagit System Cooperative. [Wasserman Comments #1-2]

William Paleck, North Cascades National Park, National Park Service. [NPS Comment #1]

Tom Paulus, Bayview Farms, Inc. [Paulus Comments #1-6]

Hal Beecher, Washington Department of Fish and Wildlife. [WDFW Comment #1]

Steve Aslanian, Skagit Audubon Society. [Aslanian Comment #1]

Bill Reinard, private citizen. [Reinard Comments #1-2]

Scott Fowler, Dahlman Pump & Well Drilling, Inc. [S. Fowler Comments #1-14]

Bruce Fowler, Dahlman Pump & Well Drilling, Inc. [B. Fowler Comments #1-7]

Joan Crooks, Washington Environmental Council. [WEC Comments #1-3]

Roy Metzgar, City of Everett, Public Works. [Metzgar Comments #1-3]

John Phipps, Mt. Baker-Snoqualmie National Forest, Forest Service. [USFS Comments #1-2]

B. D. Rhodes, Puget Sound Refining County. [Rhodes Commnets #1-5]

Appendix C

Copies of all public notices

Appendix D

Transcript of the Public Hearing, 11/29/00

Appendix E

Final Rule

Chapter 173-503 WAC
Instream Resources Protection Program
Lower and Upper Skagit Water Resources Inventory Area
(WRIA 3 and 4)

Chapter 173-503 WAC
INSTREAM RESOURCES PROTECTION PROGRAM -- LOWER AND UPPER SKAGIT WATER RESOURCES INVENTORY AREA (WRIA 3 AND 4)

NEW SECTION

WAC 173-503-010 GENERAL PROVISION. These rules apply to waters within the Lower and Upper Skagit water resources inventory area (WRIA 3 and 4), as defined in WAC 173-500-040, excluding the Samish River subbasin, Fidalgo, Guemes, Cypress, Hope and Goat islands. This chapter is promulgated pursuant to chapter 90.54 (Water Resources Act of 1971), chapter 90.22 RCW (Minimum water flows and levels), and chapter 173-500 WAC (Water resources management program).

NEW SECTION

WAC 173-503-020 PURPOSE. The purpose of this chapter is to retain perennial rivers, streams, and lakes in the Lower and Upper Skagit water resources inventory area and Cultus Mt. Tributaries with instream flows and levels necessary to provide for the protection and preservation of wildlife, fish, scenic, aesthetic, and other environmental values, and navigational values, as well as recreation and water quality.

Chapter 90.54 RCW (Water Resources Act of 1971) requires that utilization and management of waters of the state be guided by a number of fundamentals, including:

Uses of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial. (RCW 90.54.020(1))

The quality of the natural environment shall be protected and, where possible, enhanced, as follows:

Perennial rivers and streams of the state shall be retained with base flows necessary to provide for the protection and preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served. (RCW 90.54.020 (3) (a))

Waters of the state shall be of high quality. Regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into said waters shall be provided with all known, available, and reasonable methods of treatment prior to entry. Notwithstanding that standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the existing quality thereof, except in those situations where it is clear that overriding considerations of the public interest will be served. (RCW 90.54.020 (3)(b))

In administering and enforcing this regulation, the department's actions shall be consistent with the provisions of chapter 90.54 RCW.

NEW SECTION

WAC 173-503-030 FINDINGS. Ecology finds that (1) The magnitude or variability of flows are important in maintaining the aquatic ecosystem that sustains both fish and other valuable resources. Criteria to limit total withdrawals of water from the Lower Skagit River were developed to protect the aquatic ecosystem in the region covered by this rule.

(2) To protect the estuary area below River Mile 8.1 the duration of flow inundation of at least one foot of depth, in selected estuary habitat, can be reduced no more than 10% from existing conditions from the date of enactment of this regulation. This criterion applies to the period of February through August to withdrawals from the Skagit River. Total withdrawals greater than 836 cubic feet per second during that period will result in a greater than 10% deviation from existing conditions and therefore would result in harm to the fisheries resources and aquatic ecosystem in the region covered by this rule.

(3) Protection of the aquatic ecosystem of the estuary in the months of September through January requires that the total withdrawals of water from the Skagit River not exceed 1/10 of the 50% exceedence flow for each month, based on the period of record (1/1/41 – 12/31/95) for the US Geological Survey (USGS) stream gage on the Skagit River near Mt. Vernon, WA (Sta. #12-2005-00) in order to maintain channel morphology and other estuarine and riverine functions. This equates to a low point of 830 cubic feet per second during the month of September. Total withdrawals greater than 830 cubic feet per second during the month of September will not protect and preserve fish , wildlife and other environmental values and therefore would be harmful to fisheries resources and the aquatic ecosystem in the region covered by this rule in violation of chapter 90.54 RCW.

(4) The rules setting minimum flows in the Lower and Upper Skagit River (WRIA 3 and 4) (WAC 173-503-040) and finding certain waters available (WAC 173-503-050)are necessary to protect and preserve wildlife, fish, scenic, aesthetic and other environmental values.

NEW SECTION

WAC 173-503-040 ESTABLISHMENT OF INSTREAM FLOWS. (1) Stream management units and associated control stations are established as follows:

Stream Management Unit Information

Stream Management Unit Name Control Station No.	Control Station by River Mile and Section, Township and Range; Latitude and Longitude	Stream Management Reach
Skagit Mainstem:		
Skagit River near Mt. Vernon, WA USGS Sta. #12-2005-00	River Mile (RM) 15.7	From mouth of Skagit River including tidal fluctuation to headwaters.*
Cultus Mountain Tributaries:		
Mundt Creek	Stream gage will be installed at RM 3.4 (Sec/Twn/Rng; Lat/Long)	From mouth to headwaters.
Turner Creek	Stream gage will be installed at RM 4.2 (Sec/Twn/Rng; Lat/Long)	From mouth to headwaters.
Gilligan Creek	Stream gage will be installed at RM 3.2 (Sec/Twn/Rng; Lat/Long)	From mouth to headwaters.
Salmon Creek	Staff gage periodically recorded will be installed at RM 4.3 (Sec/Twn/Rng; Lat/Long)	From mouth to headwaters.

* Other additional control stations and instream flows may be established in WRIAs 3 & 4 to improve water management.

(2) Instream flows are established for the stream management units in WAC 173-503-040 (1) as follows (See Figures 1 through 3):

Instream Flows as measured at USGS Sta. #12-2005-00
(Instantaneous cubic feet per second)

USGS Sta. #12-2005-00

Month	Day	Skagit River
Jan.	1–31	10,000
Feb.	1–29	10,000
Mar.	1–31	10,000
Apr.	1–30	12,000
May	1–31	12,000
Jun.	1–30	12,000
Jul.	1–31	10,000
Aug.	1–31	10,000
Sep.	1–30	10,000
Oct.	1–31	13,000
Nov.	1–15	13,000
	16–30	11,000
Dec.	1–15	11,000
	16–31	10,000

Instream Flows for Cultus Mountain Tributaries, WRIA 3
(Instantaneous cubic feet per second)

Month	Day	RM 3.4 Mundt Creek	RM 4.2 Turner Creek	RM 3.2 Gilligan Creek	RM 4.3 Salmon Creek
Jan.	1-31	6.4	7.9	19.8	4.0
Feb.	1-29	6.4	5.4	19.8	4.0
Mar.	1-15	6.4	5.4	19.8	4.0
	16-31	9.4	5.4	27.7	4.0
Apr.	1-30	9.4	7.9	31.7	4.0
May	1-31	9.4	7.9	31.7	1.4
Jun.	1-30	9.4	4.9	31.7	1.4
Jul.	1-31	7.6	4.9	39.6	1.4
Aug.	1-31	7.6	4.9	39.6	1.4
Sep.	1-30	7.6	4.9	39.6	4.0
Oct.	1-31	7.6	7.9	23.8	4.0
Nov.	1-30	9.4	7.9	27.7	4.0
Dec.	1-31	9.4	7.9	27.7	4.0

(3) Instream Flow Hydrograph. Figure 1

Skagit River near Mt. Vernon, WA
Gage 12200500 at RM 15.7
Period of record: 1940-94

Instream Flows

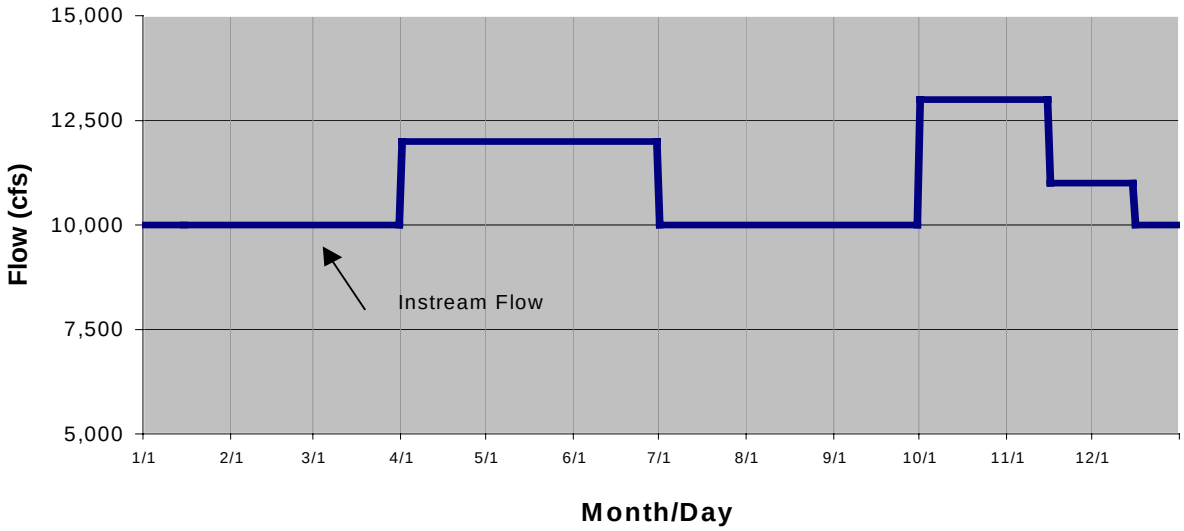


Figure 2

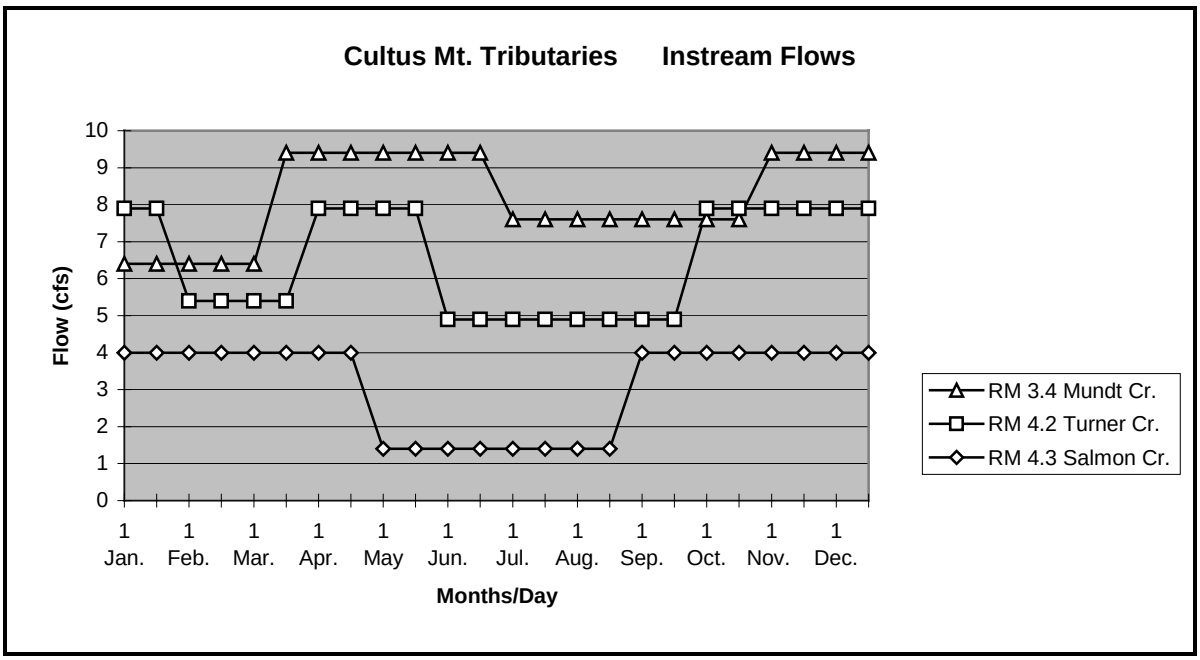
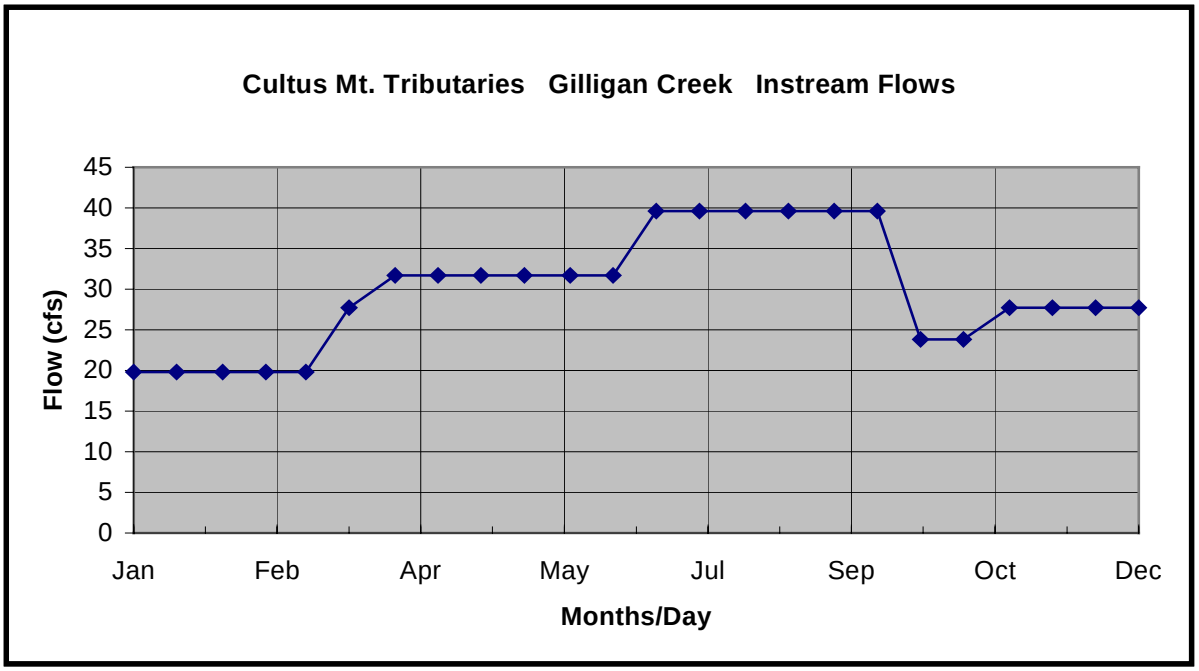


Figure 3



(4) The instream flow hydrographs, as represented in Figures 1 through 3 in WAC 173-503-040(3) shall be used for identification of instream flows.

(5) Future consumptive water right permits issued hereafter for diversion of surface water in the Lower and Upper Skagit (WRIA 3 and 4) and perennial tributaries, and withdrawal of ground water in hydraulic continuity with surface water in the Skagit River and perennial tributaries, shall be expressly subject to instream flows established in WAC 173-503-040 (1) through (3) as measured at the appropriate gage, and also subject to WAC 173-503-060.

(6) Future consumptive water rights issued to applications pending at the effective date of the regulation are superior in priority date but shall be conditioned on the instream flows established in WAC 173-503-040 (1) through (3). (RCW 90.03.247)

NEW SECTION

WAC 173-503-050 WATER AVAILABILITY DETERMINATION (1) The department has made a determination that 200 cubic feet per second is available to be appropriated through ground water withdrawal or surface water diversion for further instantaneous consumptive appropriation in the Lower and Upper Skagit watershed (WRIA 3 and 4). These waters are available for appropriation, subject to existing rights, exemptions in WAC 173-503-070, and instream flows in WAC 173-503-040(2). This determination was based upon review of existing water right records and existing water use, and is consistent with the findings section (WAC 173-503-030) of this regulation.

(2) The department advises that water rights issued to appropriate these waters determined to be available by this rule will be interruptible rights.

(3) After these instantaneous diversion or withdrawal of the 200 cfs quantities identified in paragraph (1) of this section have been allocated by Ecology, the Lower and Upper Skagit Watershed WRIA 3 and 4) shall be withdrawn from further consumptive appropriations. This rule may be reopened to further consumptive appropriation only if further information demonstrates that such appropriations can be made consistent with the finding section (WAC 173-503-030) and the instream flow section (WAC 173-503-040). If further information demonstrates that the amount in the availability determination set forth in paragraph (1) of this section should have been less than 200 cubic feet per second, Ecology will not be bound by the 200 cubic feet per second number when processing individual water right applications.

NEW SECTION

WAC 173-503-060 GROUND WATER. If the department determines that there is hydraulic continuity between surface water and the proposed ground water source, a water right permit or certificate shall not be issued unless the department determines that withdrawal of ground water from the source aquifer would not interfere with stream flows during the period of stream closure or with maintenance of minimum instream flows. If such findings are made, then applications to appropriate public ground waters may be approved subject to the flows established in WAC 173-503-040(2).

NEW SECTION

WAC 173-503-070 EXEMPTIONS. (1) Nothing in this chapter shall affect existing water rights, including perfected riparian rights, federal Indian and non-Indian reserved rights, or other appropriative rights existing on the effective date of this chapter, nor shall it affect existing rights relating to the operation of any hydroelectric or water storage reservoir or related facilities.

(2) Nonconsumptive uses which are compatible with the intent of this chapter may be approved.

NEW SECTION

WAC 173-503-080 POLICY STATEMENT FOR FUTURE PERMITTING ACTIONS. (1) No rights to divert or store public surface waters of WRIA 3 and 4 which would conflict with the provisions of this chapter shall hereafter be granted, except as provided in RCW 90.54.020 (3)(a).

(2) Consistent with the provisions of chapter 90.54 RCW, it is the policy of the department to preserve an appropriate minimum instream flow in all perennial streams and rivers as well as the water levels in all lakes in the Lower and Upper Skagit watershed (WRIA 3 and 4) by encouraging the use of alternative sources of water which include (a) reuse; (b) artificial recharge and recovery; (c) conservation; and (d) acquisition of existing water rights.

NEW SECTION

WAC 173-503-090 ENFORCEMENT. In enforcement of this chapter, the department of ecology may impose such sanctions as appropriate under authorities vested in it, including but not limited to the issuance of regulatory orders under RCW 43.27A.190 and civil penalties under RCW 43.83B.335, RCW 90.03.400, RCW 90.03.410, RCW 90.03.600, RCW 90.44.120 and RCW 90.44.130.

NEW SECTION

WAC 173-503-100 REGULATION REVIEW. Review of the rules in this chapter may be initiated by the department of ecology whenever new information is available, a change in conditions occurs, or statutory modifications are enacted that are determined by the department of ecology to require review.

Attachments

A. Implementation Plan
B. Rule-Making Criteria Documentation

Attachment A
CR-103 Rule Filing Packet

Implementation Plan

Proposed Rule:

Chapter 173-503 WAC

Instream Resources Protection Program –
Lower and Upper Skagit Water Resources Inventory Area
(WRIA 3 and 4)

Ecology requires all rule to have an Implementation Plan. This plan is part of the CR-103 filing packet and be in the rule-making file prior to adoption.

The plan must describe how the Agency intends to:

1. Implement and enforce the rule, including a description of the resources the Agency intends to use.

In the past 25 years, Ecology has established Instream Resources Protection Programs in the majority of Puget Sound watersheds. Each of these previous regulations was implemented by the department through its Water Resources Program. A pattern in the implementation of these previous rules has been established. Chapter 173-500 WAC (Water resources management program) provides the general administrative rules for implementing watershed-specific rules within the statewide water resources management program. Specific sections of Chapter 173-500 WAC address the processing of water rights, and conditioning permits with applicable instream flows.

Administration of the Chapter 173-503 WAC (Lower and Upper Skagit Water Resources Inventory Area (WRIA) 3 and 4) will be the responsibility of the Water Resources Program at Ecology's Northwest Regional Office (WRP-NWRO) in Bellevue, Washington. The WRP-NWRO staff already administers instream resources protection programs for the Nooksack (WRIA 1), Snohomish (WRIA 7), Cedar-Sammamish (WRIA 8), Green-Duwamish (WRIA 9) and Kitsap (WRIA 15).

Current staffing levels at the WRP-NWRO are less than is necessary to meet the water resources needs in all 7 counties and 10 WRIAs in the region. Scheduling staff to the workload is a constant concern for management. Currently only three full-time staff and one part-time staff are assigned to permit writing. Their responsibilities are divided among the 10 WRIAs. The permit writers are currently supported by two hydrogeologists, two administrative staff, and an intern. Region-wide there are two staff assigned to well-drilling and a single staff is dedicated to enforcement.

Ecology indicated in previous rule-filing and environmental documents, and during the public workshop and hearing that it would being processing water rights as soon as the Skagit IRPP rule is effective. This was also a commitment to local governments signatory to the MOA. The practicability of this commitment is uncertain given the limitations that chronically low staffing levels put on water rights administration. There are 93 pending water right applications in the Lower and Upper Skagit watershed.

Adoption of the instream flow rule will facilitate permit decision-making during the course of implementing the rule. Ecology will continue to review the circumstances of each individual application for a determination of water availability. In fact, every time Ecology issues a new water right it will have to review the current state of knowledge about the amount of existing rights and water remaining potentially available.

Enforcement of the rule will be the responsibility of WRP-NWRO. The rule will require new water right holders to cease diverting from surface waters and withdrawing from ground water sources when flow drop to the levels set in the rule. This is expected to be a frequent occurrence requiring compliance actions virtually every low flow season (August – October). It is the responsibility of water right permittees to obey the conditions of their permits.

2. Inform and educate affected persons about the rule.

Rule-making has started the education process through public outreach, workshops and media attention. Ecology's continued presence in the watershed is very important for encouraging compliance with the rule. There are other possibilities for educating the public on the rule. The watershed planning process under ESHB 2514 is in Phase 2 – Technical Assessment. It is expected that as plan development begins in Phase 3 the discussion of water management and water rights will be addressed in the watershed Planning Unit.

Drought contingency planning is a shared responsibility with local government. It is possible that Ecology's enforcement of the rule could be coordinated with local government responsibilities during times of water scarcity. Under the terms of the MOA signed for the purposes of establishing the instream flows, the two biggest public water utilities (Skagit PUD and City of Anacortes) must begin public awareness efforts well in advance of streamflows reaching the levels in the rule. These public announcements must contain information on the conservation options and whether any mandatory water use restrictions could be anticipated. Ecology could issue accompanying announcements to water right holders subject to the rule regarding the likelihood that interruption of their rights would occur.

3. Promote and assist voluntary compliance.

Ecology is implementing a compliance policy agency-wide that requires a priority be given first to technical assistance and voluntary compliance. New water right holders will be informed on how to manage their water needs during times of scarcity. There may a need to be established an informational network at the local level that monitors streamflows and distributes this information to water users. Phase 3 watershed planning would be a logical forum to discuss how such a locally-administered water management system could be established.

A particularly difficult aspect of implementation is what to do about water users who do not have documented water rights or have never applied for water rights. A policy statement was worked out between Ecology and the ESHB 2514 Planning Unit that while watershed planning was underway Ecology would put its emphasis on information gathering for the purposes of the watershed assessment and not to go out into the field with the sole intention of stopping undocumented water use. This policy did not abrogate Ecology's authority to take enforcement actions where environmental damage was occurring and listed species were harmed, particularly during drought conditions. It is still Ecology's intent to have illegal water users apply for water rights, which would make them subject to the rule.

4. Evaluate whether the rule achieves the purpose for which it was adopted including, to the maximum extent practicable, the use of interim milestones to assess progress and the use of objectively measurable outcome.

The rule establishes instream flows to protect streamflow throughout the Lower and Upper Skagit watershed. The rule will protect ecological processes from further degradation by causing new water rights to cease diverting when streamflow falls to the level in the rule. The rule goes farther than other existing instream flow rules by making determination that a certain amount of water is available for further appropriation. The purpose of the determination of water availability is to guarantee that highly-valued resources in the Skagit estuary are maintained by traditional flow regimes.

Monitoring of the effectiveness of the rule will be possible by maintaining a thorough stream-gaging network. The Lower and Upper Skagit watersheds are well covered by the USGS gaging network. Streamflow at Mount Vernon is the single most important environmental measure that must be continuously monitored. Gaging records for the Mount Vernon station are available on a real-time basis on the USGS web-page.

The determination of water availability will give Ecology and applicants a starting point to confirm the water availability question, however, pending and new water rights applications must still conform wth the tenets of the Water Code (Ch. 90.03 RCW). Because the determination of availability is imprecise and there is a degree of uncertainty about the amount of existing water rights, Ecology will have to address the availability question in each Report of Examination required pursuant to the Water Code. With the uncertainty inherent in the determination of availability, Ecology will be continually reviewing the status of those estimates for existing rights.

5. Train and inform Ecology staff regarding the new rule or rule amendment.

Training for Ecology staff will be the responsibility of the WRP-NWRO, with the assistance of policy and administrative support staff at WRP-Headquarters. The Water Resources Program Management Team is ultimately responsible for making policy determinations that are consistent with the law and uniform among the Ecology regional offices. Integration of the Water Resources Program and other Ecology water programs (Shoreland and Environmental Assistance, and Water Quality) occurs at the regional office through the Water Regional Management Team (WRMT). Addressing cross-program concerns and coordination is also the responsibility of the Skagit Watershed Lead.

6. Identify program documents that may need to be revised because of the new rule or rule amendment.

The Skagit IRPP is innovative in that it protects both the Skagit River and the estuary, and it couples the instream flow rule with a determination of water availability. Both of these precedents will need to be brought into Ecology's exisitng guidance for instream flow setting. Fortunately, Ecology has embarked on the Programmatic Environmental Impact Statement (PEIS) for instream flow setting (Ecology, December 2000). It will be appropriate to incorporate policies and procedures developed the Skagit IRPP into the statewide document.

Attachment B
CR-103 Rule Filing Packet

Rule-Making Criteria Documentation

Proposed Rule:

Chapter 173-503 WAC

Instream Resources Protection Program –
Lower and Upper Skagit Water Resources Inventory Area
(WRIA 3 and 4)

In accordance with RCW 34.05.328, before adopting a significant legislative rule, and agency shall:

Clearly state the general goals and specific objectives of the statute that the rule implements.

The proposed rule will establish instream flows for the Lower Skagit Mainstem and Cultus Mountain tributaries. All pending and subsequent water right applications will be conditioned as provided in the proposed rule, if applicable. The proposed rule will also establish a quantity of water that may be available for appropriation from the surface and ground waters regulated by this proposed rule.

Determine that the rule is needed to achieve the goals and objectives of the specific statute, and analyze alternatives to rule making and the consequences of not adopting the rule.

The Skagit Basin (WRIAs 3 and 4) is among the few basins in western Washington for which instream flows have been adopted pursuant to Chapter 90.54 RCW (Water Resources Act of 1971). With Puget Sound chinook salmon listed under the Endangered Species Act, and increasing population growth, state rules to ensure adequate water to protect salmon in the region must be adopted, where appropriate, as soon as practicable. Regulating water rights subject to instream flows is clearly provided for in statute.

Other regulatory approaches were considered and found to be less effective than the proposed rule in the Supplemental Environmental Analysis (Ecology, October 2000). The Skagit Basin could be closed pursuant to chapters 90.22 and 90.54 RCW. Closure is appropriate if no additional water is available for appropriation. The rule makes the determination that additional water is available for appropriation. An adjudication would determine the validity and quantity of water rights, and could result in increased streamflows. This approach is appropriate for basins that are already over-appropriated. Adjudication would be costly and time-consuming. The Skagit Basin could be withdrawn pursuant to RCW 90.54.050 if there is and inadequate informational basis for instream flow setting.

Determine, after considering alternative versions of the rule and the analysis above, that the rule being adopted is the least burdensome alternative for those required to comply with it.

The rule imposes conditions on new water right applicants that will cause water use to be interrupted on a fairly regular basis in the low flow period. The instream flow levels established in the rule are high but appropriate for the important instream resources that are protected by the rule. Less burdensome instream flow levels would not provide adequate instream resources protection. The Skagit Basin remains open for further appropriation under the determination of water availability.

Determine that the rule does not require those to whom it applies to take an action that violates the requirements of another federal or state law.

The instream flow rule sets conditions on new water rights that will cause the diversions to cease when streamflow falls to the levels set in the rule. These levels are established to provide for the protection of fish, including the Puget Sound chinook salmon, which is listed as threatened under the ESA. It is not known at this time whether the protection levels are considered adequate by the federal fish agencies responsible for enforcing the ESA. The instream flow recommendations were developed by scientists that are conversant with the federal fish managers responsible for listed species in the Skagit Basin. No comments were received from the federal fisheries "services" during the official comment period.

The listing of Puget Sound chinook salmon became effective on January 8, 2001. After that date no action taken can result in a "taking" of a listed species by harming, harassing or damaging its critical habitat. It is possible that the federal agencies could impose more stringent conditions on water right applicants when they apply for federal licenses and permits. However, it is unlikely the federal agencies would require less stringent conditions.

Determine that the rule does not impose more stringent performance requirements on private entities than on public entities unless required to do so by federal or state law.

The rule applies equally to private and public entities.

Determine if the rule differs from any federal regulation or statute applicable to the same activity or subject matter and, if so, determine that the difference is justified.

As discussed above, it is unknown what requirements might be imposed on a water right applicant when a federal permit, license or review is required (e.g., Corps 404 permit for dredging or filling). No other federal regulation or statute has been established that would affect water right applicants. Instream flows for existing hydropower or water storage projects are not being set by this rule. Instream flows for new federal licenses and permits will be established through separate authority of the department (i.e., Section 401 of the federal Clean Water Act).

Coordinate the rule, to the maximum extent practicable, with other federal, state or local laws.

The instream flow rule can become a centerpiece for the protection and management of the Skagit Basin. By protecting streamflows and addressing unique qualities of the Skagit estuary, the Skagit River Instream Resources Protection Program becomes an environmental standard that other federal, state or local laws can integrate into their regulatory programs. Skagit County government has coordinated some of their aquifer protection regulations to previous Ecology stream closures. Coordination of the instream flow rule with other regulatory programs could be considered in Phase 3 ESHB 2514 watershed planning.

Place in the rule-making file documentation of sufficient quantity and quality so as to persuade a reasonable person that the determinations are justified.

The rule-making file has full documentation of the determinations made in flow-setting and considerations in developing a rule for water management purposes in the Skagit Basin. In addition, the environmental documents that accompanied the proposed rule (DNS, Environmental Checklist, and Supplemental Environmental Analysis, Ecology, October 2000) discuss the full range of regulatory options that were considered in rule-making.

Place in the rule-making file a rule implementation plan.

The Rule Implementation Plan is attached to the Rule Filing Packet as Appendix A.

/S/ Joe Stohr, Water Resources Program Manager 3/12/01